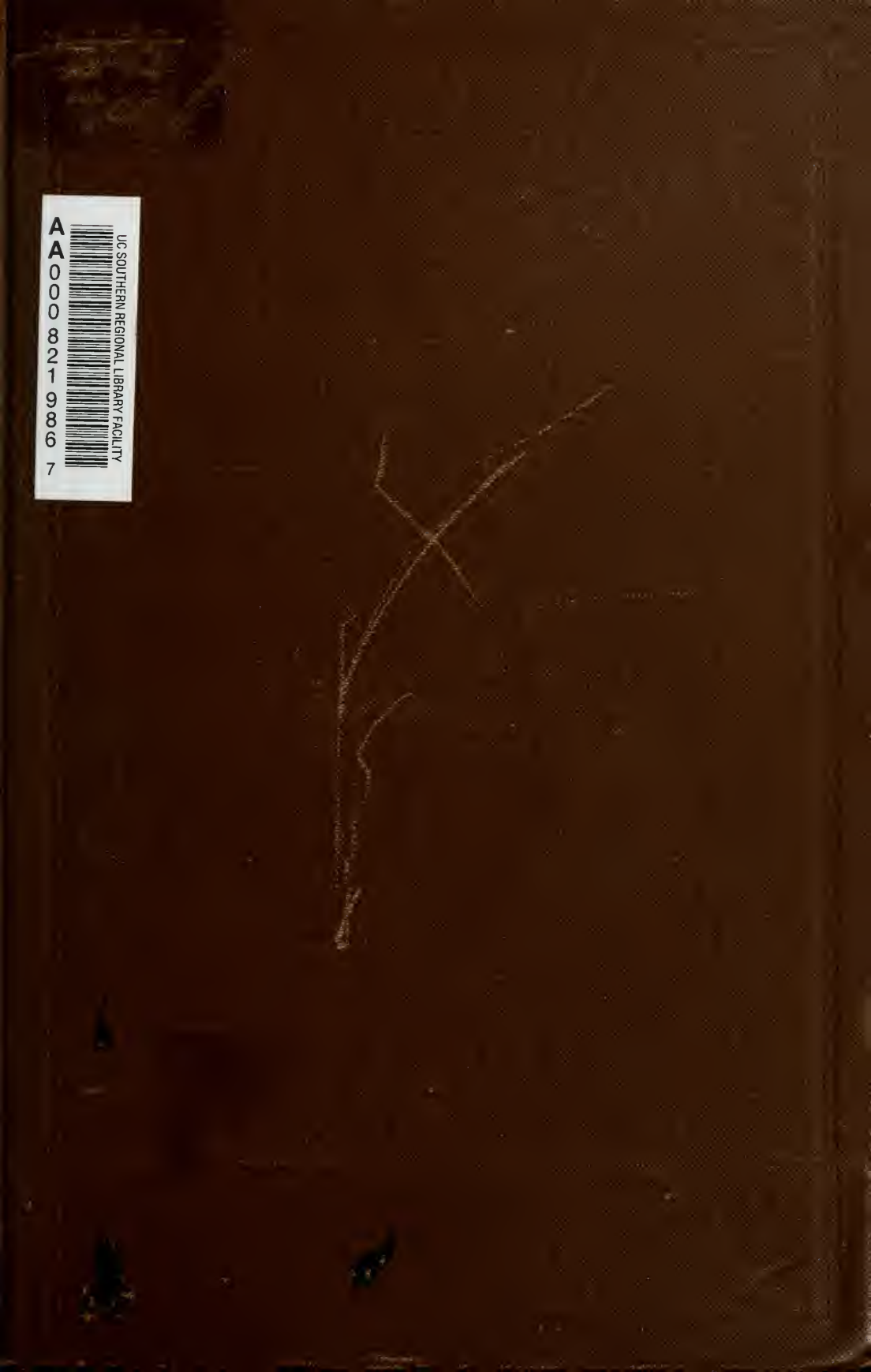

CONFLICT OF LAWS

By

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DEDICATION.

TO

MY BROTHER

J. Harry Tiernan,

WHOSE CAREER UPON THE
BENCH OF NEW YORK STATE
HAS BEEN A BRILLIANT ACHIEVE-
MENT IN THE PUBLIC SERVICE, AND
WHOSE LIFE IS A NOBLE LESSON
IN DEVOTION TO FAMILY, LOY-
ALTY TO COUNTRY, AND FIDEL-
ILTY TO THE CHURCH.
THIS VOLUME IS
AFFECTIONATELY
DEDICATED.

PREFACE.

There are three general systems of legal instruction in use in American Law Schools—the lecture, the case, and the text method. Regardless of the relative superiority of one to the others, the author is convinced, after seven years teaching experience, that no one of these methods alone is adequate to sound, thorough instruction in the law. In his presentation of this difficult subject in the class-room, he has produced satisfactory results only by a combination of text, cases, and lecture in proper proportion. The value of a text in stating the principles of the law in brief form can not be denied. The necessity of reading leading decisions that support and apply those principles is indisputable. And finally, there is the general discussion in class; the Instructor when necessary, expounding the subject, imparting the benefits of his knowledge and experience and observation, thereby arousing and sustaining interest in the work; these are the things that elevate instruction from the mechanical to the intellectual.

In presenting this text therefore, the author makes no defense. He has embodied the fundamentals of the subject in the text in simple form. He has scrupulously selected the leading decisions and included them in the notes, where they are identified by large conspicuous citation. Finally, instead of merely stating the law, he has by clear simple language explained it, so as to reproduce, as far as possible, the full value of the class instruction. It is this very feature, it is believed, that will commend it for Law School purposes to Instructor and class alike.

While hopeful of the success of this, his first literary effort, the author is nevertheless humanly conscious that errors will be found, and for these he assumes complete responsibility. But he takes this opportunity to publicly

acknowledge his gratitude to the members of the Faculty, especially Dean Francis J. Vurpillat, for their sincere moral support, and to the students of law in the University of Notre Dame for their generous suggestions during its preparation.

JOHN P. TIERNAN.

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COMITY

CHAPTER I

Rule: COMITY IS THE ENFORCEMENT BY ONE STATE OF A RIGHT ACQUIRED UNDER THE LAWS OF ANOTHER.[1]

Exception: SUCH A RIGHT IS NOT ENFORCIBLE IF ITS ENFORCEMENT WOULD VIOLATE LOCAL PUBLIC POLICY.[2]

Sec. 1. Explanation.—There are forty eight states in the American Union. Each State has its own separate system of laws. And each state has its own separate territory within the limits of which those laws operate. That is, the laws of a state are local. They do not operate exterritorially in other states. Hence, if the laws of a state confer a right on a party, he can constitutionally enforce it only within the limits of that particular state. He can not go into another state therefore, and demand that it enforce his right, since all laws and the rights they create operate locally, and are not entitled to compulsory enforcement in other states of the Union.

Now, while it is true that one state is not bound to enforce a right acquired by the laws of another, it is on the other hand true that a state can waive its own sovereignty. That is, a state can, and generally does enforce, on the principle of Comity, a right acquired by a party under the laws of a sister state. But, as we have seen, this sovereign act of comity is not a constitutional obligation of the state. It is a mere act of courtesy. In fact, a state can, if it deems it expedient, absolutely refuse to enforce any right owing its origin to the laws of a neighboring state. But the general policy of the

1—FARMERS & MERCHANTS BANK VS. SUTHERLIN 93 NEB. 707, 141 N. W. 827. *See:* Hilton vs. Guyot 159 U. S. 113, 16 S. Ct. R. 139.

2—PENNEGAR VS. STATE 87 TENN. 244, 10 S. W. 305.

states, however, is to enforce rights conferred on a party by the laws of another jurisdiction. Hence, Comity is a principle that primarily aids such a party. It enables him to obtain access to our courts and the process of our laws to redress a grievance. On the contrary, if the state refused to apply the principle of Comity in his behalf, his right being local, would have to be enforced in his own state; it would cease to be enforcible when he came into our state; and he being without remedy, our courts would be a party to injustice, rather than a dispenser of justice to all alike.

Nor is that all. Comity has an extensive operation. Under its principles all rights of a foreign origin are enforced. In short, its complete scope is the whole field of legal rights, derived directly or indirectly from the laws of a state. It enforces rights in tort. It enforces obligations in contract. It makes no distinction between a right based on the rules of the common law or a right owing its origin to a statute. It even recognizes domestic relations, such as a marriage solemnized under the laws of another state, and thereby in a direct way, the state preserves its own social stability. So therefore, the dominating principle of the CONFLICT OF LAWS is Comity, whereby the state assists a party by enforcing a right he has acquired in another state. In that way, it not only aids him , but by doing so, builds up its own commercial and social welfare and advances the cause of justice generally.

Sec. 2. In the foregoing discussion, it was shown that on principles of interstate courtesy, a right acquired under the laws of one state is generally enforcible in another state. There is however, an exception to this general rule. In fact, the exception is more important than the rule, because the exception is based generally on moral grounds. That is, a state will not enforce a right acquired under the laws of another, if to do so would violate its own public policy. All states waive their sovereignty when it is expedient to do so, but

no state will waive its sovereignty, when public policy is involved. So it is then, that if the application of the general rule of Comity will violate the public policy of a state, that state can and will refuse to enforce a right under those exceptional circumstances.

The question now arises, how is public policy determined? Considered negatively, the mere fact that there is a difference between the laws of two states does not prove a difference in public policy. There is always a difference between the laws of two states. In some cases that difference is material. But regardless of its extent, there is always a diversity in the laws of our states, altho there is not necessarily any difference in their public policy. If a difference in law established a difference in policy, the exception would be the general rule, and the doctrine of Comity would not exist. Our conclusion therefore is, that the test of the public policy of a state is not to be found merely in the fact that the laws of one state differ from the laws of another.

Well, then how *is* public policy determined? The author believes that it is rather a *moral* than a legal question. If a right sought to be enforced, in other words, involves a violation of the *moral* principles of a state, it violates its public policy. Of course, the moral principles of a state are those that are deduced from its laws, but whether those laws resemble or differ from those in the state where the right arose, is not the material inquiry. The only question therefore is, whether the right is one that is contrary to the moral standards of the state. This moral basis of public policy can be illustrated by a leading case in the law of marriage, *Pennegar v. State*, 87 Tenn. 244, 10 S. W. 305. In that case, Tennessee had a statute that prohibited the remarriage of the guilty party to a divorce. A resident of the state, desiring to remarry after a divorce, and intending to evade the statute, withdrew from the state and was married in Alabama. On his return to Tennessee he was tried for criminal cohabitation. The Court held he was guilty. It refused to recognize as valid, a marriage solemnized un-

der the Alabama laws, because to uphold it would be in violation of its own local public policy. The court placed its decision in the case on *moral* grounds entirely. It said: "Each state or nation has ultimately to determine for itself what statutory inhibitions are intended to be imperative, as indicative of the decided policy of the state concerning the *morals* and good order of society * * * if the statutory prohibition is expressive of a decided state policy as a matter of *morals,* the courts must adjudge the marriage void here as *contra bonos mores.*"

This case sustains and illustrates our principles. In this case, the laws of Alabama and Tennessee were materially different. That is, the laws of one state prohibited the remarriage, while the laws of the other allowed it. But, that difference standing alone, did not establish a difference in the public policy of these two states. On the other hand, since the law involved a question of morality; since the purpose of the law was to preserve the public morality of the state of Tennessee; its basis was morality and not merely expediency. Hence, since the marriage celebrated in Alabama, though valid there, on *moral* grounds violated the *public policy* of Tennessee, the Tennessee court refused it recognition.

We have discussed the general principle of Comity and its very vital exception. In the ensuing chapters we shall explain the application of the principle and its exception to the leading subjects of the law.

TORTS

CHAPTER II

Rule: A TORT ACTION IS LOCAL IF ITS PURPOSE IS TO DETERMINE TITLE TO REAL PROPERTY; IN ALL OTHER CASES IT IS TRANSITORY.[1]

Rule: A LOCAL ACTION MUST BE BROUGHT IN THE STATE WHERE SUCH PROPERTY IS LOCATED; BUT A TRANSITORY ACTION CAN BE BROUGHT IN ANY STATE.[2]

Rule: THE RIGHTS OF THE PARTIES TO A TRANSITORY ACTION ARE GOVERNED BY LAW OF THE STATE WHERE IT AROSE.[3]

Rule: THE REMEDIES OF THE PARTIES, HOWEVER, ARE REGULATED BY LAW OF THE STATE WHERE THE ACTION IS BROUGHT.[4]

Sec. 3. Explanation.—In the CONFLICT OF LAWS tort actions are classified into local and transitory. An action is local if its purpose is to establish rights in real property. Hence, if A sues B in an action of ejectment to establish title to real property, it is a local action, since the purpose of the action is to determine their rights in the property.

1—**LITTLE VS. R. R. CO., 65 MINN. 48, 67 N. W. 846**; Eingartner vs. Ill. Steel Co., 94 Wis. 70, 68 N. W. 664.

2—**HERRICK VS. R. R. CO., 31 MINN. 11, 16 N. W. 413**; Little vs. R. R. Co., 65 Minn. 48, 67 N. W. 846; Eingartner vs. Ill. Steel Co., 94 Wis. 70, 68 N. W. 664; Conant vs. Irrigation Co., 23 Utah 627, 66 Pac. 188. *See:* Cooley vs. Scarlett, 38 Ill. 316, 87 Am. D. 298; Burnley vs. Stevenson, 24 Oh. St. 474, 15 Am. R. 621; Clement vs. Willett, 105 Minn. 267, 117 N. W. 491.

3—**BUCKLES VS. ELLERS, 72 IND. 220, 37 AM. R. 156; ALABAMA G. S. R. CO. VS. CARROLL. 97 ALA. 126; 11 SO. 803**; Baltimore & O. S. W. R. R. Co. vs. Read, 158 Ind. 25, 62 N. E. 488; *See:* Brunswick Term. Co. vs. Bank, 40 C. C. A. 22, 99 Fed. 635.

4—O'Shields vs. R. R. Co., 83 Ga. 621, 10 S. E. 268; B. & O. R. R. Co. vs. Joy, 173 U. S. 226, 19 S. Ct. R. 387; **AUSTIN VS. R. R. CO., 122 KY. 304, 91 S. W. 742.** *See:* Brunswick Term. Co. vs. Bank, 40 C. C. A. 22, 99 Fed. 635.

But that is not all. If the primary purpose of the action is to determine the title of the parties in the property, and incidentally the party suing demands a money judgment, it is also a local action. Hence, if A sues B in an action of ejectment, and demands damages for unlawful detention of the property, it is a local action. In this case, since the title of the parties to the property is the main issue, and the money judgment a mere incidental issue, the action is regarded as substantially local.

Now, there is a clear distinction to be observed between local and transitory actions. We have seen that an action is local if its only or principal object is to decide the rights of parties in real property. But on the other hand, the mere fact that real property is involved in an action, does not make it local. That is, if real property is only indirectly involved, it is not a local action. In other words, if the purpose of the action is to recover a money judgment only, it is a transitory action. Hence, if A sues B to recover damages for a trespass to real property, it is a transitory action, because the purpose of the action is to recover a money judgment, although real property, but not the title thereto, was involved in the action. So therefore, our conclusion is, that whether an action is local or transitory, depends on the purpose of the action. If its only or principal purpose is to decide the title of the parties in the real property, the action is local. In all other cases it is transitory; that is, the action is transitory if its purpose is *wholly* to recover compensation.

Sec. 4. Now, the important distinction between local and transitory actions in the CONFLICT OF LAWS is, that if an action is, under the foregoing principles local, it must be brought in the state where the real property is located. It cannot be brought in any other state under any doctrine of Comity, not because of a rule of public policy, but because of jurisdictional principles. This is fundamental. Real property is inherently and perma-

nently stationary. It always has been, and always will remain, located in the state of which it is territorially and legally a part. And the laws of that particular state are the only laws under which the title of parties in that property can be determined. Hence, one state cannot sustain an action to decide questions of title to real property in another state. It could not entertain such an action if it wanted to, under any doctrine of Comity. This is the one class of cases to which the subject of Comity does not apply. Local actions must be brought in the state where the property is situated, since no other state possesses a legal jurisdiction in the premises.

But on the other hand, if a transitory action arises, under the rules of Comity the action can be brought in any state. Transitory actions are brought to recover a money judgment. That is, they are brought not against real property that is necessarily stationary and local, but against a person who is likely to be found in any state and therefore subject to the jurisdiction of any state. So therefore, a local action must be brought where the property is located, because that is the only state where jurisdiction can be acquired, and a judgment rendered. But a transitory action can be brought in any state where the person is found, and being in that state, he can be served with process and jurisdiction thereby be acquired. These basic principles were applied in the Minnesota case of *Herrick v. R. R. Co.,* 31 Minn. 11, 16 N. W. 413 where a party sued for personal injuries sustained in Iowa. The Court held the action transitory and allowed a recovery. It said: "The general rule is that actions for personal torts are transitory and can be brought wherever the wrongdoer can be found and jurisdiction of his person obtained. That liability, if the action is transitory, can be enforced and the right of action pursued in the courts of any state which can obtain jurisdiction of the defendant, provided it is not against the public policy of the laws of the state where it is sought to be enforced."

Sec. 5. In our study of Torts, we recall that a tort is an act or omission in violation of law, that injures the person or property of another. In other words, to constitute a tort, there must be an act prohibited by the law of the state where that act is done. If the act that injured a person or property is nevertheless not prohibited by the law of the state where the act is done, there is no tort, regardless of the actual injury caused in any case. Now, if therefore, under the laws of the state where the act is done, it is not prohibited and is not a tort, a party cannot bring an action on the basis of such an act in another state. A right is derived from the law of a state. If that law creates no right there is none, and if the party goes to another state and sues, there is no recovery because he has brought no cause of action with him. Hence, whether an act is or is not a tort depends on the law of the state where that act was done.

A leading case in which these principles are sustained is *Buckles v. Ellers,* 72 Ind. 220, 37 Am. R. 156. In that case, A sued B for seduction, bringing the action in Indiana. The acts which were alleged to constitute a tort were all done in Illinois. But the Illinois law did not prohibit those acts, or make them a tort. The Court therefore held that there was no recovery. In other words, whether an act is a tort depends on the law of the state where the act is done. And if it is not a tort there, it is not a tort in any other state. So that, since there is no legal right involved, there is no cause of action under the principles of Comity.

Sec. 6. Now, assuming that an act done in a state is by its laws a tort, so that the injured party therefore has a cause of action which he can generally enforce in any state, what bearing has the law of the state where the *action is brought*, on the case? In the foregoing discussion it was shown that the rights of the parties in a tort action are governed by the laws of the state where the tort was committed. That is, to use a

latin term, they are determined by the *lex delicti,* the laws of the state where the tortious act was done. But does the law of the state which creates and defines a right govern the *remedy* to enforce it? There is certainly in the law, and especially in the CONFLICT OF LAWS, a distinction between right and remedy. A party who sues in one state to enforce a right he acquired under the laws of another is asking the judicial aid of that state. And that state, we have seen, extends him its aid on the general principles of Comity; but in enforcing his right there, he must submit to the remedy that its laws graciously provided him. He cannot as a right, demand that the state where he goes entertain his action. Much less can he demand that the state administer a different remedy in his case than its courts generally administer in favor of all other litigants. In short, he is, as to the *remedy,* governed by the law of the state where he brings the action; but as to the right, it is defined by the law of the state whose laws originally conferred it. So therefore, in the CONFLICT OF LAWS respecting actions in tort, there is a substantial distinction between right and remedy.

The difficult inquiry however, is to decide whether a particular question pertains to the remedy. If it pertains to the right, it is governed by the law of the state where tort was committed. That is, as was above stated, the *lex delicti.* But if it concerns the remedy, it is regulated by the law of the state where the action is brought, that is, in latin, the *lex fori,* the law of the forum. A case in which this very question arose was *Austin v. R. R. Co.,* 122 Ky. 304, 91 S. W. 742. In that case, A was injured in Indiana by the negligence of a Railroad company. He sued the Company in Kentucky to recover for those injuries. While the action was being tried, he died. His administrator sought to revive the action and proceed with the trial. The question was, can the action be revived? The solution of this question depended of course on whether the power to revive a pending action is a question that pertains to the right

or to the remedy, since the laws of Kentucky and Indiana conflicted on the point. The Kentucky Court held that the power to revive an action pertains to the remedy; and is therefore regulated by the law of the state where the action is brought; and since it was brought in Kentucky, its law allowing revival governed the case, so the trial could proceed. Now, it will be observed with respect to the case cited that, the Court held substantially that the revivability of the action is a procedural and not a substantive question, and hence is determined by the law of the forum.

But, the important question is, how do we distinguish generally between things that relate to the right and things that relate to the remedy? The author believes it is simpler to recognize a remedial than a substantive element in a tort. Naturally, they are exclusive. That is, an element in a case is either of the right or of the remedy. It cannot be both at the same time. The safe guide therefore, is to first decide whether it is remedial. Now, as a rule it is remedial if it deals with a question of pleading. And, it is remedial if it presents a question of practice. And again, it is remedial if it presents a question of evidence. Now, since right and remedy are exclusive, if, within these general principles, the question of law in a case pertains to the remedy, the law of the state where the action is on trial will govern its solution. Otherwise, the law of the state where the action arose will be applicable.

But, in spite of the general rules that have been stated which will materially assist in distinguishing these two conflicting elements that are always present in a tort action, a still more difficult question arises. It is this, which law—the *lex delicti* of the *lex fori*—governs defenses? A defense is that which defeats an action. That is, it defeats it either on technical or on meritorious grounds. In other words, some defenses bar an action; others show it does not exist. Hence, there are two forms of defense—the one technical and the other meritorious. A good illustration of a technical defense

is abatement. This defense means that where a tort is personal, the right to sue abates with the death of the party. But it is nevertheless a technical defense. It merely bars the action. It does not go into the merits of the case. It does not absolutely prove that there is no action. It is evasive, on the other hand, it entrenches itself in the technicality of procedure, and in that way, by a species of legal cowardice, this defense bars the action. It is therefore a defense created by the law of procedure, that is, the law of the state where action is brought. Hence, our conclusion is that if a defense is technical only, it presents a question of procedure, and the right to interpose it is governed by the law of the forum.

Now, the other class of defenses are of an entirely different character. They are meritorious. They show no action exists. They prove on the merits by actual trial before a jury, that there is no liability in the case, because there is no right that has been violated. Certainly such a defense is distinguishable. Where there is no right there is no liability, since these terms are correlative. Now then, where a defense shows that there is no liability, it necessarily shows there is no right. This is indisputable. In simpler language, where there is a right there is a liability. And where there is no right there is no liability. Now, if a defense proves that there is no liability, it necessarily proves there is no right, and since the question as to whether there is a right or liability in a case is a substantive question, the right to interpose it is governed by the law of the state where the cause of action arose. A good illustration of a meritorious defense is contributory negligence. This means that in an action of negligence, if the party suing was guilty of contributory negligence in causing the injury, he cannot recover. It goes into the merits of the case. It proves that there was no right since there was no liability, because where a party is guilty of contributory negligence, there is legally no tort. This class of defense is therefore a defense created by the substan-

tive law, that is, the law of the state where the injury occurred, and the right to interpose it is governed by that law exclusively. These principles are logical. Concrete illustrations of right and remedy will be found in the multitudinous decisions on the subject, and while the distinctions developed here are not directly stated, they are established argumentatively by the citations in the notes.

DEATH ACTIONS

CHAPTER III

Rule: A DEATH ACTION ARISES IN THE STATE WHERE THE FATAL INJURY WAS RECEIVED.[1]

Rule: THE ACTION IS TRANSITORY.[2]

Rule: THE RIGHTS OF THE PARTIES ARE GOVERNED BY LAWS OF THE STATE WHERE THE FATAL INJURY WAS RECEIVED.[3]

Rule: THE REMEDIES OF THE PARTIES HOWEVER, ARE DETERMINED BY LAW OF THE STATE WHERE THE ACTION IS BROUGHT.[4]

Sec. 7. In our preceding discussion of Torts, it was shown that whether an act is a tort or not, depends on the law of the state where that act was done. If it is a tort there, it creates a liability enforcible in any state. Now, a death action is a tort. That is, it is an action to recover damages for an act that causes the

1—**McCARTHY VS. R. R. CO., 18 KANS. 46, 26 AM. R. 742.**

2—**DENNICK VS. R. R. CO., 103 U. S. 11, 26 L. ED. 439;** Leonard vs. Navigation Co., 84 N. Y. 48, 38 Am. R. 491; *(Contra:* Vauter vs. R. R. Co., 84 Mo. 679, 54 Am. R. 105; Ash vs. R. R. Co., 72 Md. 144, 19 Atl. 643). Wooden vs. R. R. Co., 126 N. Y. 10, 26 N. E. 1050; **NELSON VS. R. R. CO., 88 VA. 971, 14 S. E. 838.** Higgins vs. R. R. Co., 155 Mass. 176, 29 N. E. 534. *Contra:* **Saint L. I. M. & I. R. R. Co. vs. McCormick, 71 Tex. 660, 9 S. W. 540;** O'Reilly vs. R. R. Co. 16 R. I. 388, 17 Atl. 906; **BALTIMORE & O. R. R. CO. VS. CHAMBERS, 73 OH. ST. 16, 76 N. E. 91; DOUGHERTY VS. PROCESS CO., 255 ILL. 369, 99 N. E. 619.**

3—**USHER VS. R. R. CO., 126 PA. ST. 206, 17 ATL. 597;** Wooden vs. R. R. Co., 126 N. Y. 10, 26 N. E. 1050; Higgins vs. R. R. Co., 155 Mass. 176, 29 N. E. 534; **HARTNESS VS. PHARR. 133 N. C. 566, 45 S. E. 901;** Hartley vs. Hartley, 71 Kans. 691, 81 Pac. 505. *See:* Brunswick Term. Co. vs. Bank, 40 C. C. A. 22, 99 Fed. 635.

4—Vawter vs. R. R. Co., 84 Mo. 679, 54 Am. R. 105; **WOODEN VS. R. R. CO., 126 N. Y. 10, 26 N. E. 1050.** *See:* Brunswick Term. Co. vs. Bank, 40 C. C. A. 22, 99 Fed. 635.

death of a person. It will be observed therefore, that a death action involves two acts,—the injury and the death. And the question now arises, which of these acts is the tort? Is it the injury that produces death that is regarded as the tort? Or on the contrary, is it the death that is thereby produced, that is regarded as the tort? The decision of this question is preliminary to a discussion of death actions, since we must first determine where the tort is committed before we can assign a governing law to the tort. A careful analysis of the problem shows that a death action is a tort not in that state where the death occurs, but in that state where the fatal injury was inflicted. In other words, the tort involved is the *injury* and not the death. That is, the injury is the cause; the death is the effect. The injury is the act of the defendant; the death the resulting act of nature. The injury is the sufficient cause of the death, voluntarily produced by the defendant. The death is its involuntary, inevitable consequence. So therefore, in the CONFLICT OF LAWS, a death action is a tort in the state where the original fatal injury was inflicted, regardless of where the injured person died. And being a tort solely in that state, the rights and liabilities of the parties to the action are governed by the law of that state.

These principles were applied in the case of *McCarthy v. R. R. Co.,* 18 Kans. 46, 26 Am. R. 742. In that case the Kansas court held, that where the injury was inflicted in Missouri and death resulted in Kansas, the cause of action was governed by the law of Missouri, since the injury having been received there, the tort of death by wrongful act was complete there, and not in Kansas where death occurred. Hence, the locality in the CONFLICT OF LAWS, of a death action is where the fatal injury was received.

Sec. 8. In our study of Comity, it was shown that a right acquired under the laws of one state can generally be enforced in another state. A death action is no ex-

ception. If the right to sue for tortious death is conferred by the laws of the state wherein the injury that caused it was inflicted, the right is redressable in all states, because being an action to recover damages, and not to try title to real property, it is transitory. It is true, death actions are in some respects peculiar; but they are not peculiar in respect of their enforcement in other states. Incidentally, they are of statutory orgin, not having existed under the common law. But the statutory character of a right, it was shown under the rules of Comity, does not distinguish it from any other right. When a court therefore enforces a death action on the principle of interstate reciprocity, it does not enforce the law that creates it. It simply enforces a right that law creates. It is to be noted that Comity is a principle that is being gradually extended, and not limited, in its operation. There was a time when a distinction existed between common law and statutory torts, but that distinction, having an unsound basis, is now generally repudiated.

The United States Supreme Court in the leading case of *Dennick v. R. R. Co.,* 103 U. S. 11, 26 L. Ed. 439 gives an interesting discussion of the whole subject. In that case A sued a railroad company in the state of New York for the tortious death of a person injured in New Jersey, where the deceased later had died. The action was held maintainable. The Court said: "Wherever by either the common law or the *statute* law of a state, a right of action has become fixed and a legal liability incurred, that liability can be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties." And in holding the action transitory the Court said: "It is indeed a right dependent solely on the *statute* of the state, but when an act is done for which the law says a person shall be liable, and the action by which the remedy is to be enforced is of that character which the law recognizes as *transitory* and not local, we cannot see why the defendant may not be held

liable in any court to whose jurisdiction he can be subjected by personal process or voluntary appearance, as was the case here."

These forceful quotations from the outstanding decision on death actions are sufficient to show that a death action, though statutory in orgin, is also transitory, and can be enforced in any state under the general rules of Comity, applicible to such actions.

Sec. 9. So far, the substance of our discussion of death actions is, that they arise in the state where the injury is inflicted; that they are statutory torts; and that, being actions to recover a personal judgment, are transitory; and hence, can be enforced in any state where jurisdiction of the person is acquired. We now pass to a more complicated series of problems. And these problems will be, to determine which state law determines the various questions that will arise.

Now, before discussing the application of the special rules of CONFLICT OF LAWS to death actions, it will clarify the subject to refer briefly to a few fundamentals. And these are that a death action is a tort. And in torts there is a distinction between rights and remedies. And since a death action is a tort, there is therefore in death actions, a distinction between a question of right and a question of remedy. And the result is, that if the question relates to the rights of the parties, it is governed by the law of the state where the death action arose. But, on the other hand, if the question relates to the remedies of the parties, it is determined by the law of the state where the action to recover damages for tortious death is brought. So therefore, we have a sharp distinction in death actions, as we have in all tort actions, and that is that questions of right are governed by the *lex delicti* and questions of remedy by the *lex fori.*

But the difficulty is, how do we decide whether a particular question in a death action relates to the right or whether it pertains to the remedy? It is realized

that there is a real difficulty in such case. If we refer to the decisions, the only light we receive is in the form of a general principle, but not in the form of any distinction that will readily distinguish cases of right from remedy So therefore, we must propose a test. And that test, it is believed, is that if the statute conferring the right of action, *by its own terms,* contains a provision on the subject, the question is one of right. Otherwise, it is one of remedy.

Now, what is the explanation of this distinction? Briefly, a death action is in some respects peculiar. It is peculiar especially in that the statute creating it, creates not only the right, but *also* the remedy to enforce that right. The statute is an entirety. The right and the remedy are so inseparable, that whether the party sues in his own state or in a neighboring state, suing on the statute, he must comply with its provisions by using the remedy that statute gives him to enforce the right. Hence, in death actions, the general principle is that the rights *and* the remedies of the parties are generally governed by the law of the state where the action arose. But, by way of distinction, if the statute contains no provision on the subject, in such a case, it is strictly a question of remedy, and will be governed by the law of the forum. In our syllabus of the Chapter, it was stated that the rights of parties depend on law of the state where fatal injury was received, but that the remedies were regulated by law of state where action is brought. Those two basic propositions are sound law, provided the distinction is understood, and that is that the statute must first be consulted. The statute *always* determines their remedies, but where it is silent, in such a case, the remedy is governed by the law of the forum.

Now, let us refer to an illustrative case for an application of the law as it has been developed. In *Usher v. R. R. Co.,* 126 Pa. St. 206, 17 Atl. 597, the facts were, that A sued the Railroad Company in Pennsylvania for the death of B in New Jersey, basing the right of re-

covery on the New Jersey Statute. The New Jersey statute provided that action for death must be brought by the personal representative of the deceased, whereas A, in this case was not the personal representative, but merely the widow. The Pennsylvania court held the action not maintainable. The Court said: "Is the question of the party who may sue merely a question of the remedy and therefore determinable by the law of the forum? Undoubtably there are cases where it is so. But where the matter is not of form merely, but of right, the *remedy* must follow the *law of the right.*" Hence, paraphrasing the opinion of the Court, it was held that in a death action the statute must first be consulted to determine whether a question is substantive or remedial. If the statute contains a provision, as it did here, directing the personal representative to sue, the question is determined by the law of the state where action arose, even though ordinarily in other actions that is purely a remedial question.

So therefore, our conclusion on this whole subject is, that if a dispute arises in a death action as to whether it is a substantive or a remedial question, first of all consult the statute on which the action is based. It will always contain substantive, and generally contain some remedial, provisions. Now, if it will by its terms solve the problem, it governs. But on the other hand, if the statute is silent and contains no provision on the subject, in such a case the question of remedy is governed by the law of the forum.

Sec. 10. The distinction established in the foregoing discussion was that in death actions, the rights of the parties are *always* governed by the *lex delicti,* and that the remedies are *generally* fixed by the *lex delicti,* unless the statute does not contain a provision on the subject. In such a case, where the statute does not determine the specific question of remedy, it is determined by the *lex fori.* In other words, the remedies of the parties to a death action are generally prescribed in the statute

along with the rights, and where it regulates the remedy, the law of the forum has no application.

But the law of remedies is very broad. The statute can at best only prescribe the procedure to enforce the right in a general way. It cannot therefore, anticipate *all* questions of remedy that will arise in the enforcement of the statute, and legislate so as to include them. So it is then, that occasionally a question of procedure arises which, on consulting the statute, we find is not expressly provided for. According to our distinction therefore, in such a case the law of the state where the action is brought decides that particular question of procedure.

This was the point involved in *Wooden v. R. R. Co.*, 126 N. Y. 10, 26 N. E. 1050. In that case, A sued the Railroad Company in New York for a death caused in Pennsylvania, thereby basing the action on the Pennsylvania statute. Now, the Pennsylvania statute contained *no* provision limiting the amount recoverable, whereas the New York Law limited the amount recoverable. The court held that the question as to the amount recoverable was a *remedial* question to be decided by the New York law, and therefore only a limited judgment could be obtained, the Pennsylvania statute having been *silent* on the question. It is clear therefore, in this discussion of death actions that this general distinction is recognized and applied by the courts. And in view of the very peculiar nature of a death action it is really not at all singular. A death action is, as has been insisted, statutory. The right to recover and the remedy whereby to recover, are both statutory, and are deemed legally inseparable, so that the remedy is a part of the right, and is the only remedy therefore by which that right can be enforced. Hence, if a question in the CONFLICT OF LAWS arises, whether it relates ordinarily to right or remedy, the statute is first to be examined. If it decides the question, whether it is ordinarily substantive or procedural, the statutory provision is conclusive. On the other hand, if as in the case just cited, the statute on which

the action is predicated, does not by affirmative expression, decide the question, it is remedial, and on general principles, as in the case under discussion, is determined by the law of the forum.

CONTRACTS

CHAPTER IV

Rule: THE RIGHTS AND OBLIGATIONS OF THE PARTIES TO A CONTRACT ARE GOVERNED BY THE LAWS OF THE STATE WHERE IT WAS MADE.[1]

Exception: UNLESS IT WAS EXPRESSLY TO BE PERFORMED IN ANOTHER STATE[2] **OR, UNLESS IT CREATES RIGHTS IN REAL PROPERTY.**[3]

Rule: A CONTRACT, VALID WHERE MADE, OR EXPRESSLY TO BE PERFORMED, IS ENFORCIBLE IN ANOTHER STATE,[4] **BUT,**

Exception: IT IS NOT ENFORCIBLE IF IT IS IN VIOLATION OF LOCAL PUBLIC POLICY.[5]

Rule: A CONTRACT VOID WHERE MADE, OR TO BE EXPRESSLY PERFORMED, IS NOT ENFORCIBLE IN ANOTHER STATE.[6]

Sec. 11. We are now prepared to discuss the application of the principles of CONFLICT OF LAWS to the subject of Contracts. But before taking up the special rules of the subject, explaining them, and illustrating their application by concrete cases, it is necessary to state a few essentials by way of introduction. It is be-

1—Vermont Bank vs. Porter, 5 Day 316 (Conn.), 5 Am. D. 157; Satterthwaite vs. Doughty, Busbees Law 314 (N. C.), 59 Am. D. 554; Bank of Louisiana vs. Williams, 49 Miss. 618, 12 Am. R. 319; King vs. Sarria, 69 N. Y. 24, 25 Am. R. 128; **MILLIKEN VS. PRATT, 125 MASS.** 374, 28 **AM. R.** 241; **GRAHAM VS. BANK, 84 N. Y.** 393, 38 **Am. R.** 528; Robinson vs. Queen, 87 Tenn. 445, 11 S. W. 38; Cochran vs. Ward, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581; Baum vs. Birchall, 150 Pa. St. 164, 24 Atl. 620; Wolf vs. Burke, 18 Colo. 264, 32 Pac. 427; Evans vs. Beaver, 50 Oh. St. 190, 33 N. E. 643; Miller vs. Wilson, 146 Ill. 523, 34 N. E. 1111; Polson vs. Stewart, 167 Mass. 211, 45 N. E. 737; **APPEAL OF FREEMAN, 68 CONN.** 533, 37 **ATL.** 420; Brown vs. Dalton, 105 Ky. 669, 49 S. W. 443; State Bank of Eldorado vs. Maxson, 123 Mich. 250, 82 N. W. 31; Thompson vs. Taylor, 66 N. J. L. 253, 49 Atl. 544; Union Nat. Bank vs. Chapman, 169 N. Y. 538, 62 N. E. 672; **CANNADY VS.**

lieved that these essentials will materially assist us later on in the solution of all our problems, and enable us to determine readily, any general question in the law of Contracts.

And what are these preliminary essentials? Our study of CONFLICT OF LAWS so far, enables us to say that the CONFLICT OF LAWS is that subject which determines which state law governs a particular case. It is clear therefore, that if the facts of a case involve the laws of several states, a problem in the CONFLICT OF LAWS arises. Hence, as a simple illustration, if a contract is made in Ohio and action to enforce it is brought in Illinois, the facts here show that the laws of two different States are involved and, as we shall

RAILROAD CO., 143 N. C. 439, 55 S. E. 836; Clarey vs. Insurance Co., 143 Ky. 540, 136 S. W. 1014; Burr vs. Beckler, 264 Ill. 230, 106 N. E. 206. *Contra:* **NORTHWESTERN MAS. AID ASS'N VS. JONES, 154 PA. ST. 99, 26 ATL. 253**; **BRANDEIS VS. ATKINS, 204 MASS. 471, 90 N. E. 861**; *See:* Brunswick Term. Co. vs. Bank, 40 C. C. A. 22, 99 Fed. 635; **CHEM. NAT. BANK VS. KELLOGG, 183 N. Y. 92, 75 N. E. 1103.**

2—Scudder vs. Bank, 91 U. S. 406, 23 L. Ed. 245; Prichard vs. Norton, 106 U. S. 124, 1 S. Ct. R. 102; First Nat. Bank of Waverly vs. Hall, 150 Pa. St. 466, 24 Atl. 665; **CAMPBELL VS. COON, 149 N. Y. 556, 44 N. E. 300**; Mack vs. Quarries Co., 57 Oh. St. 463, 49 N. E. 697; **BROWN VS. GATES, 120 WIS. 349, 97 N. W. 221, 98 N .W. 205**; Clarey vs. Insurance Co., 143 Ky. 540, 136 S. W. 1014; *See:* Midland Valley R. R. Co. vs. Mfg. Co., 80 Ark. 398, 97 S. W. 679; **GARRIGUE VS. KELLER, 164 IND. 676, 74 N. E. 523; MAYER VS. ROCHE, 77 N. J. L. 681, 75 ATL. 235.**

3—**CLARK VS. GRAHAM, 6 WHEAT. 577 (U. S.), 5 L. ED.** 334; Baum vs. Birchall, 150 Pa. St. 164, 24 Atl. 620; Wolfe vs. Burke, 18 Colo. 264, 32 Pac. 427; Evans vs Beaver, 50 Oh. St. 190, 33 N. E. 643; **POLSON VS. STEWART, 167 MASS. 211, 45 N. E. 737**; Clement vs. Willette, 105 Minn. 267, 117 N. W. 491; Burr vs. Beckler, 264 Ill. 230, 106 N. E. 206; *See:* Robinson vs. Queen, 87 Tenn. 445, 11 S. W. 38; Campbell vs. Coon, 149 N. Y. 556, 44 N. E. 300; Mack vs. Quarries Co., 57 Oh. St. 463, 49 N E. 697; Walling vs. Grocery Co., 41 Fla. 479, 27 So. 46; State Bank of Eldorado vs. Maxson, 123 Mich. 250, 82 N. W. 31; Midland Valley R. R. Co. vs. M'f'g Co., 80 Ark. 399, 97 S. W. 679.

4—Scudder vs. Bank, 91 U. S. 406, 23 L. Ed. 245; **KING VS. SARRIA, 69 N. Y. 24, 25 AM. R. 128**; Milliken vs. Pratt, 125 Mass.

explain, the rights of the parties to this contract would be governed by the law of Ohio, where it was made; while the remedies would be governed by the law of Illinois, where the action to enforce it is brought. But this is only a simple illustration. A contract is generally, in actual practice a complex transaction. That is, it involves several elements, and therefore involves the laws of several states. In the CONFLICT OF LAWS the generally accepted analysis of a contract is, that there is in all contracts a state where it is made; and a state where it is to be performed; and a state where action to enforce it is brought. Occasionally, there is also a state in which the real property, which is the subject matter of the contract, is located. Now, therefore, in any contract case arising under the CONFLICT OF

374, 28 Am. R. 241; Pritchard vs. Norton, 106 U. S. 124, 1 S. Ct. R. 102; Robinson vs. Queen, 87 Tenn. 445, 11 S. W. 38; Baum vs. Birchall, 150 Pa. St. 164, 24 Atl. 620; First Nat. Bank of Waverley vs. Hall, 150 Pa. St. 466, 24 Atl. 665; Miller vs. Wilson, 146 Ill. 523, 34 N. E. 1111; Wolf vs. Burke, 18 Colo. 264, 32 Pac. 427; Campbell vs. Coon, 149 N. Y. 556, 44 N. E. 300; Polson vs. Stewart, 167 Mass. 211, 45 N. E. 737; Mack vs. Quarries Co., 57 Oh. St. 463, 49 N. E. 697; State Bank of Eldorado vs. Maxson, 123 Mich. 250, 82 N. W. 31; **THOMPSON VS. TAYLOR, 66 N. J. L. 253, 49 ATL. 544**; Garrigue vs. Keller, 164 Ind. 676, 74 N. E. 523; Mayer vs. Roche, 77 N. J. L. 681, 75 Atl. 235; **CLAREY VS. INSURANCE CO., 143 KY. 540, 136 S. W. 1014**; *See:* Chem. Nat. Bank vs. Kellogg, 183 N Y. 92, 75 N. E. 1103.

5—Hill vs. Wilker, 41 Ga. 449, 5 Am. R. 540; Bank of Louisiana vs. Williams, 46 Miss. 618, 12 Am. R. 319; **FLAGG VS. BALDWIN, 38 N. J. E. 219, 48 AM. R. 308**; Armstrong vs. Best, 112 N. C. 59, 17 S. E. 14; Emery vs. Burbank, 163 Mass. 326, 39 N. E. 1026; Gooch vs. Faucett, 122 N. C. 230, 29 S. E. 362; **BROWN VS. DALTON, 105 Ky. 669, 49 S. W. 443.**

6—Satterthwaite vs. Doughty, 44 N. C. 314, 59 Am. D. 504; Cochran vs. Ward, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581; Evans vs. Beaver, 50 Oh. St. 190, 33 N. E. 643; Brown vs. Gates, 120 Wis. 349, 97 N. W. 219, 98 N. W. 205; Union Nat Bank vs. Chapman, 169 N. Y. 538, 62 N. E. 672; **BURR VS. BECKLER, 264 ILL. 230, 106 N. E. 206**; *See:* Graham vs. Bank, 84 N. Y. 393, 38 Am. R. 528; Garrigue vs. Keller, 164 Ind. 676, 74 N. E. 523; Cannady vs. R. R. Co., 143 N. C. 439, 55 S. E. 836.

LAWS, the very first duty in order to determine the law that governs is to analyze the whole contract. Resolve it into its various elements. If all those elements transpired in the one state, there is no question of CONFLICT OF LAWS presented. But if the facts in the case show that more than one state is involved in the transaction, there is a CONFLICT OF LAWS, and it is in such a case necessary to apply the special rules we shall develop.

To begin with, the general principle is that the rights of the parties to a contract are governed by the law of the state where it is made. This is a very broad proposition. But, it is always necessary to determine as a primary inquiry, where the contract *is* made, to determine what the rights of the parties are. A contract, it will be recalled, requires offer and acceptance. But it is the acceptance that binds the contract. Hence that state, not where the offer originates, but where the *acceptance* occurs, is the place where the contract is finally made, and hence its laws are applicable. For example, the offer can be made by telegram, and that state in which it is received and its terms accepted by the receiver, is the place of contract. Or, the offer can be made by letter, and that state in which it is received, and its terms accepted by the receiver, fixes the locality of the contract. Of course, under exceptional circumstances, the general rule cannot be easily applied. For example, in insurance contracts, is it the act of the Company, or the act of the insured, that constitutes the acceptance, and hence determines where the contract was made? A simple solution of the whole difficulty can be suggested, that, it is believed, will govern all cases. And that is, that the party who originates negotiations generally makes the offer, while he who closes them certainly makes the acceptance. Hence, the party who by an overt act, accepts the proposition originated by another, accepts it in the state where he does the overt act. Therefore; if, as is generally the situation, the insured makes the application, he originates negotia-

tions not merely preliminary, but actually with a view to making a contract. And in such a case, since he therefore makes the offer, the Company accepts it in that State where it indicates acceptance by overt act, such as depositing the policy in the mail. It is evident therefore, that in the law of contracts, it is first necessary to determine which party originated the offer, and then, secondly, to determine where the other party accepted it. Having determined the state in which he by overt act, accepted the original offer, the state in which he accepted it, is the locality of the contract. Now, by the application of that simple rule, we have been able to determine in any case, where the contract was made; and having determined that it was made in a particular state, all questions dealing with the rights and obligations of the parties are governed by its laws.

Now, as to the general proposition in the syllabus, it is not arbitrary. It has a logical basis. And that is that, when two parties made a contract, they presumably make it with reference to the laws in force in the state where it is made. And more than that. Making a contract in a certain state, they presumably consulted the laws in force in that state, in order to definitely fix their rights under the contract. Hence, in the making of a contract, the law presumes that the parties consulted the laws of the state where it was made, and having consulted them, had knowledge of those laws, and having made the contract in that state with reference to those laws, that they impliedly incorporated them into their contract; so that if a question arose as to their rights, those laws alone would determine the question. So it is therefore, that the rights of the parties to a contract, whether it involves capacity to make the contract, or a question of interpretation, or the sufficiency of performance, all are referable to the law of the contract, or, as it is latinized, the *lex loci contractus,* the law of the state where the contract was made.

The general proposition that the rights of the parties

depend on the law of the contract, has been said to be very broad in its operation. And carefully analyzed it really includes three minor principles. One of these is that the capacity of a party to a contract is governed by the *lex loci contractus*. Now, the capacity of a party means the legal power to make it and incidentally incur liability. Hence, if a party lacks capacity to contract, he incurs no liability on the contract, and since he thereby incurs no liability, the other party acquires no right to hold him. Therefore, since capacity to contract deals with the rights and obligations of the parties, it is governed by the law of the state where the contract was completed.

A good illustration of this principle is the leading case *Milliken v. Pratt,* 125 Mass. 347, 28 Am. R. 241. The facts in that case were, that A sued B, a married woman, in Massachusetts to recover on a contract made in Maine, the evidence showing that under the laws of Maine, where the contract was made, it would be valid, whereas under the laws of Massachusetts, where action was brought, it would be invalid. The Court allowed a recovery. In an elaborate opinion, the Court held substantially, that the capacity of a party to contract is regulated by the laws of the state where the contract was made, and being valid there, it is enforcible in other states on the ground of Comity. This case, believed to be the original decision on this principle, is generally cited as the leading authority on this branch of the proposition.

Now, the second minor principle that can be taken as included in the general proposition that the rights of the parties are governed by the law of the contract has reference, not to capacity, but to the interpretation of a contract. That is, the interpretation of a contract is governed by the law of the state where it was made. This is clear. The interpretation of the contract is the construction placed upon it by the Court. It is in other words, the act of the court in ascertaining the meaning of the contract. Naturally, where a contract is ambiguous, necessity for a construction of its terms arises.

And where this necessity arises, since, when the parties made the contract, they made it with reference to the laws of the state where they contracted, those laws will govern its interpretation, because they have been, in legal contemplation incorporated into it, made a part of it, and therefore the only laws that can be resorted to in ascertaining their intentions. So therefore, the interpretation of a contract is a question that, like capacity, directly touches the rights and duties of the parties, and hence, is regulated by the law of the state where the contract was made.

A case directly in point is *Cannaday v. R. R. Co.,* 143 N. C. 439, 55 S. E. 836. The facts were that A sued a Railroad Company in North Carolina for personal injuries sustained in South Carolina, where the contract of employment was made. In the course of the trial, the question arose as to whether a certain clause in the contract was a release of the cause of action, or, merely an agreement to elect to release but reserving a right to sue. The North Carolina Court held that this was a question as to the interpretation of the contract, and was therefore governed by the law of South Carolina where the contract was made. The case is clearly sound. The question involved in the case was solely whether a certain ambiguous provision was to be interpreted by the law of the state where action was brought, or by law of that state where contract was entered into. Since it was made in South Carolina, the parties in using language to express their agreement, in legal contemplation, had reference to the laws of the state where they made it. They therefore made those laws a part of their contract by implication, and in case of ambiguity, such South Carolina laws would be applied in ascertaining their rights under the contract.

But there is a third and final minor principle that is included in the general proposition that the rights of the parties are governed by the law of the contract. And this is that the discharge of a contract is determined by the law of the state where it was made. The

discharge of a contract means briefly, that the parties are no longer liable on it. That is, it means that one no longer has a right on it against the other. In other words, it means that one party has done a certain act in pursuance of the contract, that the law regards as a performance, and being a performance of the contract, has discharged him from all liability. Hence, the question as to whether a contract has by certain acts, been discharged, deals directly with the rights of the parties, and is therefore governed by the law of the state where the contract was made. Right and liability are correlative terms. One cannot exist without the other. If one party is discharged, there is no liability on his part, and therefore no right in the other party to the contract to hold him to it.

A leading case in which this very question arose was *Graham v. Bank,* 84 N. Y. 393, 38 Am. R. 528. The facts although complicated, briefly are that A, a married woman, sued the bank in New York for certain dividends owing on stock she had acquired in Virginia; she and her husband residing in Maryland. The bank's defense was that it had paid the dividends to her husband, and that since under the Virginia law, where the contract was made, regardless of Maryland law where they were domiciled, the husband is legally entitled to the personal property of the wife, that payment to the husband was payment to the wife, and therefore a discharge of the contract between the wife and the bank. The Court upheld the defense of the bank. It was said: "In the present case the contract was made in Virginia and to be performed there. The dividends were there declared and payable. They were paid to the husband who could lawfully receive and appropriate them, by the law of Virginia to his own use and benefit. The payment was therefore valid and effectual and discharged the bank from liability."

The decision is unassailable. The facts clearly showed the contract was made and even to be performed in Virginia. Being made there, the rights and liabilities

of the parties were under our general rule governed by the law of Virginia. And by that law, payment of money due on a contract with a wife relieves the other party even though he pays it to the husband, since under the Virginia law, in personal property rights, the husband acquires all to which the wife is entitled. Since therefore, payment of money is an act that discharged the contract, and such payment was made in accordance with the Virginia law which was the place of contract, it was sufficient to discharge the bank; the domicile of the parties having no bearing on the law of contracts, since domicile determines, as we shall explain under marriage, only the *marital* rights of husband and wife, while the question here involved strictly the *contractual* rights of wife and a third party, the banking corporation.

The substance of the entire foregoing explanation is that the capacity to contract; the interpretation of the contract; and finally, the question as to whether it has been discharged, are all determined by the laws of the state where the contract was originally entered into, irrespective of the domicile of the parties.

Sec. 12. The general principle, as we have shown, is that the law of the state where a contract is made, decides all questions that relate to the rights of the parties. But now, there is a distinct problem presented, and that is, what law governs if the contract is made in one state, but is to be performed in another? It is generally true that if two parties make a contract in a certain state, they presumably contract with reference to the laws of that state, and in legal contemplation incorporate those laws into the contract, and make them a substantial part of it by implication; hence such laws are operative upon the contract.

But clearly this is only a general rule. If the parties, on the other hand, contract in one state and expressly stipulate that the contract is to be performed in another state, an entirely different situation occurs. In other words, in such a case, where the contract is made in one

state, but is to be performable in another state, the parties presumably contract with reference to *its* laws, in legal contemplation they incorporate *those* laws into the contract and they make *them* a substantial part of it by implication. Our inference therefore is, that generally speaking, a contract is regulated by the law of the state where it was made, but as an exception, it is regulated by the law of the state where it is to be performed, if the parties agree that it is to be performed in a different state. Hence, the rule and the exception rest on the common ground, that the governing law of a contract is that law which the parties have in their contract, actually intended by its terms.

As a fact, in practise a contract is generally made and performable in the one state, and where that is the case, as it generally is, the proper law is the *lex loci contractus*. Now, since in business transactions a contract is generally made and to be performed in the same state, the general commercial practise has created the general rule of law, that the proper law is where it is made. And, since in business affairs a contract is only in exceptional cases performable in a state other than where it was made, the exceptional practise here has created the exceptional rule of law that in those few cases, the proper law is the *lex loci solutionis,* that is, the law of the state where it is to be performed. So therefore, the exception we are now discussing is, that a contract, if performable in a state other than where it was made, is governed by the law of the state where performance is to be had. And there is no difficulty in defending either the rule or the exception, because, as has been said, the applicatory law is that law with reference to which the parties contracted. If it is made and performable in the one state, they contract with reference to the law where it was made. But if it is made in one state and is performable in another state, in such a case they certainly by their very agreement, contract with reference to the laws of the state where it is to be performed; and incorporate them into the

contract; and make them part of that contract; and of course those laws are therefore, decisive as to their rights in the transaction.

This vital exception, that a contract, if performable in another state, is governed by the *lex loci solutionis,* is very clearly applied in an instructive case, *Brown v. Gates,* 120 Wis. 349, 97 N. W. 221, 98 N. W. 205. The facts were, that A. sued B in Wisconsin to recover on certain notes made in New York, but payable in Massachusetts, the notes being valid by New York law where made, but void under the Massachusetts law where performable, as being in violation of the Sunday statutes. The Court held there was no recovery, because, although the contract was made in New York, it was to be performed in Massachusetts; and hence its validity was governed by the law of that state, and being void there, could not serve as the basis of a liability in Wisconsin. The opinion of the Court shows that this is an exceptional case. It said: "It is the general rule of the common law that personal contracts are to be deemed contracts of the state or country where they are actually made. A well established *exception* occurs, however, when a contract declares specifically, or it appears by implication, that it is to be performed in another state or country. Then its validity, nature, obligation and effect is to be *governed by the law of the place of payment or performance.*" And the decision was reaffirmed on a rehearing, when the Court stated the principle even more strongly: "When a contract is made in one state or country, to be performed in another state or country, it is to be regulated by the laws of the *place of performance* without regard to the place at which it was written, signed or dated, in respect to its validity, nature, interpretation and effect."

From these quotations, it is manifest that if a contract is made in one state, but by its terms expressly or by clear inference, it is to be performed in a different state, it is governed by the law of the state where performance is to occur, because in such a case, the contract

has been entered into with a view to those laws, and should questions arise, that such laws will be binding on the parties.

Sec. 13. The general proposition is, as we have previously explained, that the law of the state where the contract is made, decides all questions that relate to the rights of the parties. And in the preceding discussion, it was shown that there is an exception where the contract is made in one state, but is to be performed in another. In such a case, we learned that the laws of the state where the contract was to be performed must be consulted to determine the rights of the parties.

We are now in a position to consider the second exception to the general proposition, and that is, that if a contract relates to real property, it is governed by the law of the state where the property is located. In such a case, the transaction is always peculiar. And in such a case, the other elements in the transaction, such as where the contract was made, or where it is to be performed, have no bearing. In other words, if a contract creates rights in real property, it is governed by the law of the state where the real property is located, that is, in latin, the *lex loci rei sitae,* the law of the location. The basis of this exception is found in the principles of jurisdiction. In our early discussion of the subject we said that the power of a state is local. That is, it extends to all persons who are temporarily within its limits; and it extends to all real property that, of necessity, is permanently within its limits; and it extends to all acts done within its limits. These are the important rules of jurisdiction.

And they are especially so in connection with contracts relating to real estate, because, it is an absolute rule that the rights of the parties to a contract of real estate are always governed by the law of its location. They never are and never can be, governed by any other law. A person can be in one state one day and in another state another day, and thus be subject to the laws of

different states. An act may be done in one state or it may be done in another state, and thus its legal effect be regulated by the laws of different states. But not so of real property. It is fixed and stationary, and forever and in all transactions, subject exclusively to the laws of that particular state within which it is located, of which it is territorially a part, and under whose laws alone title to it and possession of it and a lien against it can be either acquired or divested. These are the essential grounds for this exception where the contract relates to real property.

So it is therefore, that on principles of jurisdiction which are a part of the subject of CONFLICT OF LAWS, where a contract creates rights in real property, the contract is governed by the *law of the location.* And this rule is very general. In such a case, the law of the location governs the capacity to make that contract. And its laws ascertain the interpretation of that contract. And finally, the law of the location must be referred to in determining whether certain acts constitute a discharge of the contract. So it is then, as has already been stated, that is a contract directly creates a right, title or interest in realty, it is in all respects regulated by the law of the state where the realty is located, in spite of all other elements in the transaction.

An interesting case in which these principles were involved is *Clark v. Graham,* 6 Wheat 577 (U. S.), 5 L. Ed. 334. The facts were that the action was brought in Ohio to determine title to a certain tract of land located there. The defendants attempted to establish title to the property by introducing a deed and power of attorney, which however, were executed in accordance with the laws of Virginia. The Court held, that since those contracts created rights in realty, they should have been executed in accordance with the local Ohio law; but not being so executed, the defendants never acquired a valid title.

It is clear from our discussion therefore, that a contract that creates or destroys rights in real property,

is regulated by the law of the location. But right here there is a very important distinction. And that is that, while a contract that creates or divests a right in real property is strictly a local contract, the point to be noted is that a contract is not necessarily local because it *involves* real property. On referring to our study of real property, we find that in conveyancing there is a big difference between a personal and a real covenant in a conveyance. Now of course, a conveyance always creates an estate in the property. But, occasionally it also contains a provision that is strictly of a personal nature. Hence, where we have to deal with a conveyance, such as a deed or a mortgage or a lease, we should carefully separate the part that is real from the part that is personal. That is, we should carefully separate the real covenant from the personal covenant, because a real covenant either *creates* or requires the doing of an act in reference to an *estate,* and is therefore *local,* and so is governed by the law of the location.

But on the other hand, a personal covenant, simply requires the doing of an act. It does not create an estate. The act to be done has no direct reference to the property, and since it is therefore personal, it is transitory, and is governed by the law of the state where the conveyance was made, that is the *lex loci contractus.* This general distinction is, it must be insisted again, necessary in the CONFLICT OF LAWS. The author submits it in his own words. It is realized however, that there will be difficulty in applying it in some cases. But the general rule is that if a clause in conveyance creates an estate in the property, that clause is local, and is governed by the law of the location. And on the other hand, if a clause requires the doing of an act not in relation to the property, but collaterally to it, it is transitory, and is governed by the law of the state where the conveyance was executed.

A case in point is *Polson v. Stewart,* 167 Mass. 211, 45 N. E. 737. The facts were that A and B husband and wife resided in North Carolina. A made a contract

with B there to release all his rights to certain real estate owned by B in Massachusetts. Under the North Carolina law, where the contract was made, and the parties resided, it was valid, whereas in Massachusetts, where the real property was located, it would be void. A refused to comply with the contract; and B sued in Massachusetts to compel him to do so. The Court held the action maintainable. It said: "It is true that the laws of other states cannot render valid conveyances of property within our borders, which our laws say are void. But the same reason inverted establishes that the *lex rei sitae* cannot control *personal covenants* not purporting to be a conveyance, between persons outside the jurisdiction, although concerning a thing within it."

This very case shows how fine is the distinction between real and personal covenants. In fact, the difficulty in distinguishing the two forms of covenant makes it advisable to develop this distinction more fully. But certain principles are clear. It has been said that if a contract creates an estate in real property, it is a local contract and hence all questions arising out of it are governed by the law of the location. Hence if a deed or a mortgage or a lease, is the contract in the case, their validity is governed by the law of the location. And why? Because a deed creates an estate, that is, legal title in the property. And a mortgage creates a lien, that is, an equitable estate in the property. And a lease creates a tenancy, that is, the right of possession in the premises. No further argument is necessary to show that in all these cases, the contracts create rights in property, and hence are governed by the law of the state where it is located.

And all these cases are relatively simple. But this very deed or mortgage or lease generally contains other provisions. That is, they generally require one of the parties to do a certain act. Now the question arises, is *this* particular provision, considered separate and apart from the rest of the deed, a real or personal covenant? Is it a local contract and therefore governed

by the law of the location? It is necessarily one or the other. Where there is a covenant to do a certain act, it is either real or personal depending on the nature of the act. In this connection, if the act has direct reference to the real property, it is a real covenant. If it has no direct reference to the real property, but is merely collateral, it is personal. For example, if a deed requires a party to use the property for certain purposes only, this provision concerns the property directly, since it regulates the possession of it. Hence, such a covenant is real. Of course, this covenant does not create an estate. But, it is to be remembered that real covenants actually include two general classes. That is, if a covenant creates an estate it is real. And further, if, as in the example, it requires the doing of an act directly in connection with the property, it is real.

On the other hand, a personal covenant covers only one class of cases. It never creates an estate in the premises. And it never requires the doing of an act in reference to those premises. The act to be done is strictly personal. It is absolutely collateral. In practise, it generally requires the payment of money. It is the exceptional case, in other words, because a majority of covenants are real. Now, on referring again to the case cited, *Polson v. Stewart*, 167 Mass. 211, 45 N. E. 737, this distinction is as we have seen, recognized and applied. The covenant in that case was personal; because, it did not create an estate in the property; and it did not require the doing of an act with reference to the use of that property. On the other hand, it required the party to execute a release, an act which as the Court said, need not necessarily be done where the property is located, but *could be done in any state.* If this case involved the example given of a covenant to use the property for certain purposes only, clearly it would be a real covenant, since property can be used for those certain purposes *only in the state where it is located.* But that was not the situation in the case.

The contract in the *Polson* case required the doing of an act; that act was personal; it was collateral; it could be performed anywhere. It did not create an estate. Nor did it require the husband to do an act in reference to the use of the property. Hence, the whole obligation was personal. Being personal, it was governed by the law of North Carolina where the contract was made, and not the law of Massachusetts, where the property incidentally affected was situated. And consequently, being personal and transitory, an action for breach of it was maintainable in Massachusetts under the general law of Comity.

Sec. 14. We have fully discussed the general principles that govern the law of contracts, and shown the application of the CONFLICT OF LAWS to that leading subject. But we have not completed our subject. We have however, learned that a contract is made in that state where the acceptance occurs; that as a general rule, the contract is governed by the laws of that state; excepting, that if a contract is made in one state, but performable in another, it is governed by the law of the state of performance; or, if it relates directly to real property, it is governed by the law of the location. These, in brief, were the outstanding propositions in the whole preceding discussion.

Now, in our discussion of Comity, it was said that Comity is not the absolute right of the party nor the constitutional obligation of the state, but that principle of sovereign courtesy wherein one state enforces a right acquired under the laws of another. And this general principle of Comity governs contracts. In fact, contracts is the law's leading subject, and so it is then, that in the field of contractual relationship, the doctrine of Comity finds most frequent application. And more than that. Not only does the rule of Comity enforce contracts more frequently than other rights, but it has developed certain special rules whereby it will enforce a contract; whereas if a different right were presented,

it, would withhold its hospitality. So it follows therefore, that as a general rule, a contract, valid where made or performable, in either of these cases, is valid in all other states and can be enforced in any of them on the basis of Comity. No elaboration of this proposition is necessary. Its peculiar application to special forms of contract like Interest and Usury, Sales and Chattel Mortgages, will be developed in subsequent chapters. It is sufficient to state here, as has been pointed out, that if by its proper law, a contract has been made, its rights will be enforced in any state in which the necessary jurisdiction can be acquired. Of course, as we have seen, if the contract relates directly to real property, it is in *all* respects, not only as to right but also as to remedy, governed by the law of the location. In our development of this particular topic, we said that a real property contract is, notwithstanding all other elements in the transaction, governed by the law of its location. That law defines the rights of the parties. It does more. It regulates their remedies under the contract. It does more still. It operates on that contract as to right and remedy so completely and so exclusively that the right it creates must be enforced in that state. It cannot be enforced in any other state. The right is therefore not transitory. And hence, since it is not a transitory right, an action to enforce a local contract, as to foreclose a mortgage, cannot be brought in any other state. The principles of Comity do not apply to it. They cannot apply to it, because of the jurisdictional impediment, that local actions can be brought only in the state where the real property is located.

So on the contrary, a contract which is not local is transitory and can be redressed by action in all states. If it is valid by the law of the state where it was made or where it was to be performed, it has a general validity throughout the states of the Union. And this is so even though if it were made in the state where action is brought, it would be invalid. This is certainly an extreme application of the Comity rule. But it is

settled law. So therefore, if a contract is valid in the state where it is made or is performable, even though it would be void if made or performable in the state where the action is brought, it is an enforcible obligation. The fact that the contract violates the law of the forum, is no objection to its enforcement, as long as it complies with the law of the contract. The difference between the law of the contract and the law of the forum is not a difference in their public policy. And hence, where there is no question of public policy involved, the mere fact that a foreign contract is in *contravention* of a local law, is no objection to its enforcement. The whole inquiry on the other hand, is, does the contract conform to the law of the state where made? If it does, it is enforcible in our state, even though it does not conform to our law, and would be void had it been made here originally.

A very good illustration of the principle can be found in *Thompson v. Taylor,* 66 N. J. E. 253, 49 Atl. 544. In that case A, a married woman, resided in New Jersey with B her husband. She executed a contract through him in New York to C, a third party there. Later C sued A in New Jersey to recover on the contract. Under the New Jersey law, where she was domiciled, the contract would be void; whereas by New York law, where she made it, it was valid. The Court held there was a recovery. It said with reference to the contract: "We are bound by the principles of Comity to recognze its validity, unless it clearly contravenes the principles of public morality." This is a leading case. In this case there was a contract made in New York. The action to enforce it however, was brought in New Jersey. And there was a CONFLICT OF LAWS, because New Jersey prohibited the making of such a contract, while New York allowed it. Hence, there was a material difference between the laws of these two states; but that did not create a difference in their public policy; so that the general policy of those two states was not different, but on the other hand similar, in that

contracts should be enforced if it is possible to do so. And therefore it was enforced, because, being valid where made in New York, it was valid and enforcible in New Jersey where action was brought, it not violating any of the moral standards prevailing in that state, but being merely at variance with its law on technical grounds.

And in this connection, it must again be emphasized that the domicile of the parties does not in any way influence the law that governs contracts. The law of the domicile is decisive simply where the personal *status* of a party is involved in a case, as in marriage; but, where the transaction is *commercial,* as in contracts, the law of the state where it is made prevails. Let us adhere to these general principles, so there will be no difficulty in determining the proper law in a given state of facts. And incidentally, in our discussion of the CONFLICT OF LAWS or of any of its subordinate topics, this has been and will be our policy. This subject is built up on a basis of certain leading principles. Of course, there are exceptions. But the author submits that we should first learn the fundamentals and then by deeper study, attempt a mastery of the subtler and finer distinctions that make this subject one of the most technical in the law.

Sec. 15. In the foregoing discussion, it was shown that if a contract is valid in one state, it is enforcible in all states on the ground of Comity. That is, we showed that the general rule of Comity applies to contracts. And in our introductory discussion of Comity, we said that there is an exception in that the privilege of Comity cannot be invoked if to do so would violate the local public policy of the state where the action is brought. Just as the rule of Comity is applied in contracts, so is the exception. Contracts occasionally do involve in their enforcement questions of public policy, and if that public policy, as ascertained from the laws of the forum, would be impugned by enforcing the agreement, it will

not be enforced. So therefore, a contract valid in one state will not, under this single exception, be enforced in another state, if it violates its local public policy.

Now, then, when *does* a contract valid in one state, violate the public policy of another? This is very simple. It violates its public policy when the right it creates is in violation of the *moral* standards of the state. Refer briefly to our discussion of Comity. We stated that as a rule, all rights acquired in one state are enforcible in other states. But, by way of exception, we also said, that a right arising in one state is not enforcible if it violates the public policy of the forum. And we said the rule and its exception dominate the whole subject of CONFLICT OF LAWS. So therefore, that rule and that exception govern the law of contracts. The rule and the exception we have already explained in our discussion of Comity. And as to the exception, it is not necessary to again insist here that public policy is essentially a *moral* question. The vital point therefore, in deciding whether a contract made in one state is enforcible in another, is to determine whether it violates local public policy. That is, consult its laws as a whole, and test the contract by the light of those laws; and if its obligations violate *moral* principles which those laws declare, it antagonizes its local public policy and is void. Of course, all states will enforce contracts if in doing so it will aid the party, and further its own commercial interests, and subserve the cause of justice, but no state will surrender its sovereign dignity by enforcing a contract the rights and obligations of which are a moral scandal under its laws.

This exception to the general principle is forcefully illustrated in *Flagg v. Baldwin,* 38 N. J. E. 219, 48 Am. R. 309. The facts were, that A sued B and C in New Jersey, to foreclose a mortgage given to secure certain notes executed to A by the defendants in New York. The contract between the parties was a gambling transaction in that it involved speculation in stocks on margins, and the note and mortgage were given to A by B

and C to cover all losses. The Court held there was no recovery. The opinion is worthy of extensive quotation: "A contract valid where made will not be enforced by the courts of another country, if in doing so they must violate the plain *public policy* of the country whose jurisdiction is involved to enforce it." And: "It seems to me that no Court can on full consideration, deliberately adopt a rule that will require the enforcement of foreign contracts violative of the public laws and subversive of the distinct *public policy* of the country whose laws and policy they are bound to enforce." And finally: "Our law against gambling goes further than to merely prohibit the vice or avoid contracts tainted with it. It declares it unlawful, and so puts the contract beyond the probation of the laws or the right of appeal to the courts. The reason and object of the law are obvious. The *vice* aimed at is not only injurious to the person who games, but wastes his property, to the injury of those dependent on him and those who are to succeed to him. It has its more *public* aspect, for if it be announced that a trustee has been false to his trust, or a public officer has embezzled public funds, by common consent, the first inquiry is whether the defaulter has been wasting his property in gambling. In my judgment, our law against gambling is of such a character, and is designed for the *prevention of vice,* producing injury so widespread in its effect, the *policy* evidenced thereby is of such public interest that Comity does not require us to here enforce a contract which is so stigmatized as unlawful, and so prohibited."

Of the thousands of cases that the author in his laborious search for material has examined in the library, he has found no case in which a principle of law is more forcefully and convincingly and masterfully presented, than in *Flagg v. Baldwin.* As a tribute to the Court, and especially the Judge who expressed its opinion in the words that have been quoted, the author abstains from further explanation of the case. It proves the exception.

Sec. 16. We now close our discussion of contracts by a brief explanation of the final proposition in the syllabus. That is, that a contract void where it is made or is to be performed, is void in all states. In view of all that has been said, this principle requires no elaboration. In fact, the principle has already been explained and illustrated, but in a slightly different form in the sections preceding. That is, we have previously stated that if a contract is valid where it is made or is to be performed, it is valid in all states; and we illustrated our proposition by the case of *Milliken v. Pratt,* 125 Mass. 374, 28 Am. R. 241. Now, this proposition is merely its converse. It merely states in negative terms a fundamental that has been previously stated in positive terms. It is therefore not necessary to state that which is perfectly clear. It is not necessary to recall that a contract is either valid or void, and if it is valid it is enforcible everywhere; while if it is void, there is really no contract, there is no right arising from it, and consequently there is no cause of action to enforce anywhere. But the author in his teaching experience, has very frequently stated legal principles that were so simple, that their very simplicity aroused a suspicion as to their soundness, so he was required to cite authority. Perhaps therefore, the citation of a few cases will not be inappropriate by way of illustration.

There is the case of *Burr v. Beckler,* 264 Ill. 230, 106 N. E. 206 which, by the way, involved several very interesting questions. We shall make a careful analysis of these principles, although the facts were very complicated. Briefly however, the situation was that A, a married woman, residing in Illinois, while temporarily in Florida, executed there a note and a deed of trust to B, to secure a certain debt incurred by her husband C. The husband having failed to pay the debt, B, the holder of the note and deed of trust, brought an action in Illinois to foreclose and recover upon these contracts. The principal defense of the wife A, in the proceeding,

was that these contracts were made in Florida, under whose laws they were void, because of her marriage, and being void there where made, were void in Illinois, under the general law of Comity. The Court held there was no recovery; *first,* because the note and deed of trust were made in Florida; *second,* that having been made there, they were governed by its law and hence void; and *thirdly,* that the note being the principal contract and the deed of trust merely incidental to it, the location of the real property had no bearing in the case. But, let us hear the Court, especially on the third principle: "The validity, construction, force and effect of instruments affecting the title to land depend on the law of the state where the land lies. *But,* If the note was void, the trust deed which was *incidental* and intended to secure a performance of the obligation created by the note, could not be enforced. It is a universal rule that the validity of a contract is to be determined by the law of the place where it is made, and if it is not valid there, it will not be enforced in any other state in which it would have been valid if made there."

These principles are sound law. The decision in the case, in substance, is that if a contract is void where it is made it is void in another state. But the case is stronger still. If a contract is void where it is made, it is void in another state, even though it is not in violation of its public policy or in contravention of its laws and therefore would be valid if made there. And there is still another element of strength in the case. It holds not only that if a contract is void in one state it is void in another, and that it is void even though its own laws would authorize it; but furthermore, that it is nevertheless void even though the contract relates to real property in the very state where the action is brought.

And why is this so? On referring to our study of real property contracts, the point strongly emphasized was that if a contract creates an estate in real property it is a local contract, and is governed by the *lex loci rei*

sitae. Certainly this deed of trust was such a contract. It was executed in Florida, but it created an estate in Illinois real property. Now then, why in this case was it *not* governed by Illinois law? Is there a distinction? Yes, there is a distinction. And what is it? It is this, that where the contract in the case in simply a real property contract *alone,* all questions are governed by the law of the location. Hence, if in this case there was no note, but just a trust deed, then the capacity of the defendant to execute *it* would be governed by the law of the location. But on the other hand, where there are two contracts in the case, a note which is the *principal* contract, and a trust deed which is *incidental* to it, all questions as to either and both these contracts are governed by the law of the state where they are made. That was this very case. There was a note, the personal contract. And there was the deed of trust, which was merely its security, a derivative contract. The note legally as a personal contract, in this peculiar situation, prevails over the deed of trust. Now then, since the note is the main contract and the deed of trust the subsidiary contract, the transaction is in the CONFLICT OF LAWS, deemed to be substantially a personal contract, and therefore governed by those laws where it was made. The validity of the security *always* depends on validity of the note.

Let me summarize here, while there is opportunity, the whole subject of CONFLICT OF LAWS as to real property contracts. Briefly, these are the principles. *First,* where a transaction consists of a real property contract only, which creates an estate therein, it is governed by the law of the location. Hence, in *Clark v. Graham,* 6 Wheat 577 (U. S.), 5 L. Ed. 334 it was held that the validity of a deed to real property is regulated by the law of the state where it is located. *Second,* where a transaction simply *relates* to real property *indirectly,* but requires an act to be done that does not concern the use of it, it is a personal contract. Hence in *Polson v. Stewart,* 167 Mass. 211, 45 N. E. 737,

it was held that a contract to deliver a release of rights to real property was essentially a personal contract. And *thirdly,* where a transaction consists of a note and its security, it is essentially a personal contract, and is governed by the law of the state where the note was delivered. Hence, in *Burr v. Beckler,* 264 Ill. 230, 106 N. E. 206, it was held that the validity of the note and deed of trust that secured it, were governed by the law of the state where the note was delivered, and not by the law of the state where the real property was located.

Can I make these distinctions clearer? Only by a final word of caution. And that is, that if a contract is to be enforced, its validity must *first* be determined. This is a necessary preliminary question. And how is its validity determined? Simply by testing it under the laws of the state that governs it. If it is void, therefore, where it is made or is performable, then it is void in all states. But real property contracts are peculiar. The peculiarity in them too is, that because a contract concerns real property, we instantly infer it is governed by the local law. That is, as we have seen, not so in all cases. If a contract creates an estate, however, it is a real property contract. And if it requires the doing of an act in reference to the use of real property, it is a real property contract. But in all other cases, even though real property is *involved,* it is a personal contract. If that very contract that creates an estate and restricts the use that can be made of that property, imposes a duty that is wholly collateral, *that* part of the contract is severable and personal. And again, if a transaction consists of a note and its security, such as a deed of trust or a mortgage, such a contract is essentially a personal contract, because of the special rule in real property that the note is the principal contract and the security its mere incident, and the note being substantially the whole transaction and the security just a means for its payment, the validity of the security is governed by the law that regulates the note.

REMEDIES

CHAPTER V

Rule: THE REMEDIES OF THE PARTIES TO A CONTRACT ARE REGULATED BY LAW OF STATE WHERE ACTION TO ENFORCE IT IS BROUGHT.[1]

Rule: THESE TOPICS PERTAIN TO THE REMEDY: FORM OF THE ACTION[2]; RULES OF EVIDENCE[3]; STATUTE OF FRAUDS[4]; STATUTE OF LIMITATIONS.[5]

Sec. 17. There is a general principle that underlies the whole structure of the subject of Contracts, and that is that the remedy to enforce it is always regulated by the law of the forum. This principle is really uni-

1—**DAVIS VS. MORTON, 5 BUSH. 160 (KY.), 96 AM. D. 345;** *(Contra:* Vermont Bank vs. Porter, 5 Day. 316 (Conn.), 5 Am. D. 157;) Robinson vs. Queen, 87 Tenn. 445, 11 S. W. 38; Security Co. vs. Eyer, 36 Neb. 507, 54 N. W. 838; **RUHE VS. BUCK, 124 MO. 178, 27 S. W. 412;** Mack vs. Quarries Co., 57 Oh. St. 463, 49 N. E. 697; Walling vs. Grocery Co., 41 Fla. 479, 27 S. 46; State Bank of Eldorado vs. Maxson, 123 Mich. 250, 82 N. W. 31; Stack vs. Lum. & Ced. Co., 151 Mich. 21, 114 N. W. 876.

2—**BURCHARD VS. DUNBAR, 82 ILL. 450, 25 AM. R. 334.**

3—**DOWNER VS. CHESEBROUGH, 36 CONN. 39, 4 AM. R. 29.**

4—**HEATON VS. ELDREDGE, 56 OH. ST. 87, 46 N. E. 638;** *Contra:* **COCHRAN VS. WARD, 5 IND. APP. 89, 29 N. E. 795, 31 N. E. 581;** Miller vs. Wilson, 146 Ill. 523, 34 N. E. 1111; Wolf vs. Burke, 18 Colo. 264, 32 Pac. 427; Halloran vs. Br'g Co., 137 Minn. 141, 162 N. W. 1082; *See:* Satterthwaite vs. Doughty, Busbees Law 314 (N. C.), 59 Am. D. 554; Emery vs. Burbank, 163 Mass. 326, 39 N. E. 126; Third Nat. Bank of N. Y. vs. Steel, 129 Mich. 434, 88 N. W. 1050.

5—**PEARSALL VS. DWIGHT, 2 MASS. 84, 3 AM. D. 35;** Bulger vs. Roche, 11 Pick. 36 (Mass.), 22 Am. D. 359; Don. vs. Lippmann, 5 Cl. & Fin. 1, 5 E. R. C. 930; **HENDRICKS VS. COMSTOCK, 12 IND. 238, 74 AM. D. 205; BROWN VS. HATHAWAY, 73 W. VA. 605, 80 S. E. 959;** *See:* **BRUNSWICK TERM. CO. VS. BANK, 40 C. C. A. 22, 99 FED. 635.**

versal, because it is qualified by no exception. We have seen, that with respect to the rights of the parties, they are governed either by the law of the state where it was made; or where it was to be performed; or where the real property was located. But as to the remedy, there is only one possible applicatory law, and that is the law of the forum where the action is on trial. And there is on careful analysis, a clear distinction in fact between a right and remedy. Comity enforces a right only. And in doing so, a state applies the laws of another state, and not its own. But when a question of remedy is presented, it applies its own laws. Its own law of procedure is in such a case consulted, because it is able to administer its own system of practise more effectively than any other system. And, since the party suing is asking that a right be enforced, he must take the remedy as he finds it in the state where he brings his action. He can not insist that the state where he sues afford him a different form of remedy, in its Comity, than it affords to its own citizens. So therefore, the procedure that governs an action in contract is that system of procedure in force in the state where the action is brought.

And this law of procedure is broad. It includes trial practise in all its stages. It includes proceedings at the trial. It includes more. Within its scope come even those proceedings that are preliminary or subsequent to the trial. It embraces the doctrines of pleading and the principles of evidence and the rules of practice, all too numerous to mention. In short, all questions that do not relate to the rights are remedial, and are regulated by the law of the forum.

An interesting case in which the point involved was whether the question was substantive or remedial, is *Ruhe v. Buck,* 124 Mo. 178, 27 S. W. 412. The facts were, that A and B, husband and wife resided in Missouri, where they were partners in business. They made a contract with C in North Dakota; and having failed to pay, C brought attachment proceedings against B,

the wife, in Missouri to seize and sell property she owned there to pay the judgment. The Missouri law however, prohibited attachments against a married woman, and the Court dismissed the proceedings, holding that whether attachment can be brought is a question that concerns the remedy. Now this case is clear. The contract was made in North Dakota. Action to enforce it however, was brought in Missouri. Therefore, since Missouri was the place of trial, its laws decided all remedial questions. Attachment is as we know, simply a proceeding preliminary to the trial, to seize and hold property so that the judgment can be paid. It is in other words, simply a means of enforcing the contract. It is a privilege created by law, and does not arise out of the contract, and consequently is in no sense substantive.

There is no way however, by which a substantive or a remedial question can be readily recognized. Each case depends more or less on its own facts. Of course, the general rule is that if a question pertains to the rights of the parties it is governed by the law of the forum. But there is no specific method by which these two questions can be categorically separated. However, the decisions of the Courts show that certain questions that generally arise on the trial of an action are substantive, while certain others are remedial. It is believed that if we refer to a few concrete cases we can clarify the subject. Let us take up a few of these specific questions separately in the ensuing sections.

Sec. 18. In *Burchard v. Dunbar,* 82 Ill. 450, 25 Am. R. 334, the facts were, that A and B, husband and wife, made a note in New York State to C. Under the New York Law, an action could, if it were instituted in that State, be brought against the wife either at law or in equity. But under the Illinois law, an action against the wife could be brought only in equity. Now, the action here was begun in Illinois. The question was, can B, the wife, be sued in Illinois either at law or in equity, or in

equity only? In other words, does the form of the action deal with the right or the remedy? The Court held that the form of the action is remedial, and is regulated by the law of Illinois where such action was brought; and hence she could be sued there only in equity, as allowed by its laws. Hence, we can infer that a question that pertains to the form of the remedy, is a remedial question. It does not deal with the rights of the parties, but simply prescribes the proper form of proceeding by which those rights can be enforced. Certainly therefore, whether an action can be legal or equitable; or in tort or contract; are questions that pertain to the form of the remedy.

Sec. 19. Another case that involved a remedial and not a substantive question, is *Downer v. Chesebrough,* 36 Conn. 39, 4 Am. R. 29. The facts were that A and B indorsed a certain note in New York. C, the holder brought action in Connecticut against A, one of them, to recover the value of the note. The material fact in the case was that when A indorsed the note to C, they orally agreed that A was not to be held liable. Under the New York law, where the note was indorsed, parol evidence to modify a writing would not be admissible; whereas under Connecticut law, where the action was brought, such parol evidence in a special case like this, would be admitted. The Court held that whether certain evidence is admissible or not is a remedial question, and hence governed by the law of the forum; and since the Connecticut law where the action was brought allowed the evidence, it could be introduced here to exonerate the indorser. So therefore, our inference from this case is that questions of evidence pertain to the remedy and are regulated by the law of the forum. The law of evidence certainly does not pertain to the rights of the parties, but merely to the judicial means by which those rights are to be proved in Court.

Sec. 20. A still more valuable case in which a ques-

tion as to the remedy was involved is *Heaton v. Eldredge,* 56 Oh. St. 87, 46 N. E. 638. The facts tersely, were that an action was brought in Ohio to recover on an oral contract made in Pennsylvania. Under the Ohio law, such a contract must be in writing by its Statute of Frauds, while under the Pennsylvania law, it would be enforcible though in oral form. The Ohio Court held there was no recovery. It said: "When the required evidence is lacking, the courts must refuse its enforcement of the contract, and it seems clear that such a statutory regulation prescribing the mode or measure of proof necessary to maintain an action or defense *pertains to the remedy.*" This is a leading case. The decision is, that the question as to whether the Statute of Frauds applies to a case is purely procedural, and is regulated by the law of the state where the action is brought. And since in this case, the contract did not comply with the Statute of Frauds of Ohio, it was unenforcible. The Statute of Frauds pertains therefore to the remedy, and not to the right. It is in fact, as the Court pointed out, a statutory rule of evidence that requires the production of a writing to prove that there was a contract, and if the requisite proof is not forthcoming, the contract is not sufficiently established.

Our conclusion therefore is that the Statute of Frauds is procedural. It relates to the remedy. It enacts that a certain species of evidence must be shown to prove the contract; and it provides that if that kind of evidence is not offered, the contract fails of proof on technical grounds, regardless of its validity in any other state, and hence, as the State of Frauds itself provides, "No action shall be brought" on such a contract. Certainly a Statute, like the Statute of Frauds, that requires a writing as proof of a contract, and then provides that if that writing is not produced on the trial, "No action shall be brought", is remedial. It regulates the procedure in the trial of the action. It prescribes the medium and the measure of proof necessary in the trial of the action. And if the party suing fails to comply

with its mandate, "No action shall be brought"; that is, no remedy shall be available to him in the state. So it is therefore, that the Statute of Frauds pertains to the remedy. And so, whether the Statute of Frauds applies to an action is governed by the law of the forum. And necessarily the terms of that particular Statute of Frauds must be consulted on the trial of the case.

And those of us who have studied contracts will remember that the Statute of Frauds is very general. It requires a large class of contracts to be written. And if they are not written, whether they relate to suretyship, or personalty, or realty, or any other subject, they are not enforcible. The purpose of the Statute, its history, and in fact its very phraseology shows, is to prevent fraud. It aims to make it impossible to prove a contract by uncertain, oral, evidence. It aims to require written, definite, satisfactory proof that there was a contract, and hence the Statute relates directly to the mode of proof. It is essentially evidentiary. It is distinctively procedural; going as it does, not to the existence of the contract, but to the proof of its existence on the trial. These principles of course require no development.

And yet, it must be recognized that the application of these rules has not been uniform by the Courts. For example, a few courts are said to hold that if a contract to sell real property is presented, the Statute of Frauds, not of the forum, but where the real property is located, governs. As to this question, *Heaton v. Eldredge,* 56 Oh. St. 87, 46 N. E. 638 said with respect to any distinction between contracts of personal and contracts of real estate under the Statute of Frauds: "This distinction has not met with general approval, and has been repudiated in the later cases, which hold that the seventeenth section relates to the remedy like section four, and the difference in phraseology between these two sections is not such as to warrant a different interpretation in that respect, but that both sections prescribe *rules of evidence* which courts where the remedy

is sought are bound to observe." It is clear from this leading case that the Statute of Frauds, as a whole, is purely a procedural Statute, without regard to the specific contract in the case. A contract to sell real property is essentially a personal contract, wherein the title is only collaterally involved, since the deed can be delivered in any state and only a personal act is to be done. So that all contracts are alike under the Statute of Frauds. It requires them to be written. And it provides that if they are not written, that "No action can be brought." It is true that in reference to real property contracts the Statute provides that if they are not written that they shall be "void". But, those of us who have studied contracts will recall that there is no more elastic term in the law than the word "void." It can certainly be used in different senses. Here it is a question of construction. Does it mean null, as a contract, or simply, unenforcible? Logically, the Statute ought to mean the same in one section as it does in another. And above all, the policy of the Statute is to be considered. It aims to require certain evidence to prove the contract and if it is not produced to withhold the remedy. Beyond that, the Statute does not aim to go. It does not make the contract void as being illegal. It accomplishes its very purpose in *all* cases by construing the word "void" as "unenforcible" and denying a remedy only in the state where action is brought. So that if the party wants to enforce his contract, he in all cases must sue in some other state. So it is therefore that the Statute of Frauds is wholly remedial.

Sec. 21. But the Statute of Limitations is not so simple. The purpose of the Statute is to discourage litigation by requiring the action to enforce a contract to be brought within a limited time, while the facts of the case are fresh in the memory of the parties. And if it is not brought, to refuse to enforce it. It is clear therefore, that the Statute of Limitations is a proced-

ural law; that it regulates the remedy on a contract, and hence, if it is not complied with, that it shall not be enforcible. The Statute, on the other hand, does not pertain to the rights of the parties. It does not create them or affect them in any way. In fact, it assumes to begin with, that there is a valid subsisting contract, but if a remedy thereon is sought, the action must be brought as directed. It is clear therefore, that to decide whether the Statute of Limitations applies and if so, which particular Statute, the law of the forum must be consulted. That is the general rule.

These principles are upheld in *Pearsall v. Dwight,* 2 Mass. 84, 3 Am. D. 35. In that case, A sued B in Massachusetts to recover on a note executed in New York. The defendant pleaded in defense, the New York Statute of Limitations, under which the action would be barred. But the Massachusetts Court held that the New York Statute could not be pleaded, and that since the action was brought in Massachusetts, its own Statute governed the action, and it not being barred there, a recovery was allowed. The case is simple. The contract was made in New York. The action to enforce it however, was brought in Massachusetts. Now, since the Statute of Limitations pertains to the remedy, the Statute in force in Massachusetts, where the action was brought governed. And since by the Massachusetts Statute of Limitation the action had not been barred, it was maintainable. This is therefore the general rule. The decision in the case cited was substantially that because an action is barred in one state, it is not necessarily barred in another. That was the very situation. The action in the case cited was barred in New York where the contract was made, but it was not barred in Massachusetts where it was brought, and not being barred in the forum, was enforcible. Hence, we can state the general rule in another way. And that is, that an action barred in the state where a contract is made is not barred in the state where it is brought, unless the laws of the forum bar it. That is the general

principle on the whole subject. All states have Statutes of Limitations. But they all differ from each other very materially in their terms, and hence in a given case it is necessary to determine which must be consulted where there are conflicting elements. Fortunately, there is the general rule and that is that the Statute of the forum governs.

But were we treating this subject in an exhaustive way, we would not be satisfied with general rules. It is certainly to be noted therefore, that there are a few exceptional cases in which it is not the law of the forum that governs with respect to the Statute of Limitations. However, very careful study of these exceptional cases has been made, and it is believed that they are not peculiar to contracts, but that they apply entirely to other actions. Hence, they are not developed here. As an example, an action to enforce the liability of a stockholder is governed, as to the Statute of Limitations, not by the law of the forum, but by the law of the state where the statutory liability is imposed. This in reality was directly held in *Brunswick Terminal Co. v. Bank,* 40 C. C. A. 22, 99 Fed. 635, where an action was brought in Maryland to enforce statutory liability of a stockholder incurred under the laws of Georgia. The Court decided that a stockholders action is statutory, the right *and* the remedy are governed by the law of the state that created it, because the right and the remedy are inseparable. The remedy is in such a case a part of the right; and when a party enforces a statutory right he must use the specific remedy it provides by suing within the time that the Statute allows. The Court said: "It is a general rule, too well settled to admit of serious controversy at this late day, that the remedies as distinguished from the rights of the parties are governed by the law of the forum, and that the statutes of limitations are part of the remedy and not of the laws affecting rights. There are however *exceptions* to this rule; one being, where a statutory liability is sought to be enforced and the statute prescribes the

period of limitation. In this case, the general rule adopting the statutes of limitations of the forum is departed from and the limitation prescribed by the act fixing the liability is applicable." That is sound law. It is true that in a few exceptional cases, such as stockholders actions, the Statute of the forum is not operative. But none of those exceptional cases are actions in contract. Actions in contract are therefore, as a general principle governed by the Statute of Limitations in force in the state where the action is brought. If it is barred by those laws, the action is not maintainable, regardless of whether it is barred or not under the laws of the state where it had its origin.

INTEREST AND USURY

CHAPTER VI

Rule: THE RATE OF INTEREST RECOVERABLE ON A NOTE IS GOVERNED BY LAW OF STATE WHERE IT IS MADE OR IS PAYABLE.[1]

Rule: THE PARTIES CAN HOWEVER, STIPULATE FOR ANY RATE VALID EITHER BY LAW OF STATE WHERE IT IS MADE OR IS PAYABLE,[2] **BUT**

Exception: SUCH STIPULATION MUST BE MADE IN GOOD FAITH.[3]

Sec. 22. We have completed our discussion of the CONFLICT OF LAWS in reference to Contracts generally. Consequently, we are now in a position to consider the application of those general rules to certain forms of Contract, and incidentally, to state any special rules that are applicable. The field of contracts is, of course, boundless. It would be impossible to discuss the multitudinous forms of Contract in the law, and show the application of the CONFLICT OF LAWS to each of them separately. No such exhaustive treatment will be attempted here. A few typical special contracts there-

1—Thornton vs. Dean, 19 S. C. 583, 45 Am. R. 796; **SCOTT VS. PERLEE, 39 OH. ST. 63, 48 AM. R. 421**; Martin vs. Johnson, 85 Ga. 481, 10 S. E. 1092; Bigelow vs. Burnham, 90 Ia. 300, 49 N. W. 104, 57 N. W. 865; Bennet vs. Ass'n, 177 Pa. St. 233, 35 Atl. 684.

2—Amer. F. L. & M. Co. vs. Jefferson, 69 Miss. 770, 12 So. 464; Shannon vs. Ass'n, 78 Miss. 955, 30 So. 51; **UNITED STATES S. & L. CO. VS. BECKLEY, 137 ALA. 119, 33 SO.** 934; Washington Nat. B. & L. Ass'n vs. Pifer, 31 App. Cas. 434 (D. C.), 14 Ann. Cas. 734.

3—Amer. F. L. & M. Co. vs. Jefferson, 69 Miss. 770, 12 So. 464; **SHANNON VS. ASS'N, 78 MISS.** 955, 30 **SO** 51; United States S. & L. Co. vs. Beckley, 137 Ala. 119, 33 So. 934; Washington Nat. B. & L. Ass'n vs. Pifer, 31 App. Cas. 434 (D. C.), 14 Ann. Cas. 734.

fore will be chosen and given special discussion, not only because of their especial difficulty, but also because of their practical importance.

Interest and usury is first of all, an appropriate topic. There is always a note. And there is generally a mortgage to secure its payment. The presence of these two contracts complicates any transaction, not to mention the diverse usury laws in force in the different states of the Union. So here we have a real problem. Now, to begin with, there are certain general rules that govern all contracts. And in this respect a note and a mortgage are not exceptional. And that is, that as to usury, the validity of a note, being a contract, is governed by the law of the state where it is made. Naturally, in deciding the question as to where it is made, we again apply a general rule of the law of contract. And that is, that a note is made in that state where it is delivered. The making of a note includes two acts,—signing and delivery. Since delivery is the final act, it is made where it is delivered. Hence, if delivery is personal, a note is made where it is transferred to the holder. If delivery is by mail, a note is made in that state where the act of mailing occurs, that being the last essential act in the case. Now, these two general rules are simply part of the law of contract which has already been discussed at length. We mention them here simply to show their application to a negotiable note. So therefore, a note is made in that state where it is delivered. And since it is made there, the rights of the parties are governed by the laws of that state. Consequently, the rate of interest recoverable being a question that deals with the rights of the parties, is regulated by the law of the state where the note was delivered. There is certainly no difficulty so far.

Now, it happens occasionally that a note is delivered in one state but is payable in another. But even here there should be no difficulty. Simply apply the general principle of Contracts we discussed in our earlier chapter. That general principle is, as we have seen, that if a

contract is made in one state, but is to be performed in another, it is in such a case governed by the laws of the state where it is to be performed. Now, then, applying this general principle, if a note is payable in a state other than where it was delivered, it is governed by the law of the state where it is payable, since payment is, as to a note, performance of the contract. Here again, we are on familiar ground. There is no difficulty. A note is a contract. And in deciding the rate of interest recoverable, to determine whether it is usurious, we simply refer to the proper law, as in ordinary contracts. So. therefore, our conclusion is that if a note is made in a certain state its validity under the usury law depends on the law of that State. But, if it is made in one state but payable in another, in such a case its validity is determined by the law of the state where it is payable. This proposition is admirably illustrated by *Bennet v. Ass'n.,* 177 Pa. St. 233, 35 Atl. 684. The facts were, that A borrowed a sum of money from a Building and Loan Association, and in a series of notes secured by a mortgage, all executed in Pennsylvania, agreed to repay the amount in New York State. The contract would, if tested by Pennsylvania law, be usurious. But, if governed by New York law, it was valid. In an action on the contract in Pennsylvania, the Court held that its validity was regulated by the New York law where the notes were payable. And since, by New York law, the notes were not usurious, the fact that they were usurious in Pennsylvania would be immaterial. This case therefore shows that the validity of a note is governed by the law of the state where it is payable. But the case is even stronger. There was a mortgage given on Pennsylvania realty, to secure the payment of the note of the maker. Still, that made no difference in the case. Because, in our discussion of real property contracts, we learned that if a transaction includes a note and a mortgage as its security, the mortgage is not an independent contract. On the other hand, the note is the main contract,

and the mortgage is merely incidental to it, and hence, since the transaction is essentially a personal contract, the law of the note and not of the mortgage, governs. This phase of our question, it will be recalled we thoroughly discussed in the case of *Burr v. Beckler,* 264 Ill. 230, 106 N. E. 206 and the principle is applied again in the case cited. Hence, the validity of a note, whether it is secured by a real estate mortgage or not, is governed not by the law of the state where the property is located, but where it is made, or is payable.

The substance of our foregoing discussion therefore is, that a note is governed by the law of the state where it is delivered; but if it is payable in another state, it is governed by the laws of the state where it is payable, the contract in such a case being made with reference to those laws. These two general principles, as a rule, can decide a majority of questions as to interest and usury.

But this subject is peculiar. It has, to a considerable extent, its own special rules. And here we begin a departure from those general rules of contracts. On referring to Contracts, we learned that if a contract is void where it is made, or is to be performed, it is void in all states. But in this special form of contract this general rule is not applied. That is, if the question whether a note is usurious arises, the principle developed by the courts is, that if it is valid where it is made but void where it is to be performed, it is valid; or, if it is void where it is made but valid where it is to be performed, it is valid. That is, notes are peculiar. They are contracts that are favored in the law. They are in reality a substitute for money. The policy of the law therefore, is to uphold a note if it is possible, not only to protect the party, but in the interests of trade and business and commerce generally. They are the common medium of exchange, possessing some of the attributes of currency, and are therefore given special consideration. So it is therefore, that the law is not so strict in testing the validity of a transaction involving

a negotiable note and its security. Consequently, they need not be valid as contracts generally must be, by both the *lex contractus* and the *lex solutionis*. Therefore, if a note is valid *either* by the law of the state where made, *or* by the law of the state where it is payable, it is enforcible in all states. That is the special rule that governs this species of contract. Hence, if it is valid by one law and void by the other, since it is valid by one of them, either the *lex contractus* or the *lex solutionis*, it is an enforcible contract. And of course, if it is valid by both laws, as is the case with contracts as a whole, it is enforcible. But if it is void by both laws, as is the case with contracts as a whole, it is unenforcible, since in such a case there would be *no* law to support it. It is evident therefore, that negotiable paper is subject to special rules, in some respects. And if it is valid by *any* law, that is, either where it was made *or* where it was payable, it is enforcible. That is the point of distinction between other contracts and a note.

Let us refer briefly to a case in point. In *Scott v. Perles*, 39 Oh. St. 63, 48 Am. R. 421, A sued B in Ohio to recover on a note executed in Ohio, but payable in Illinois. Now, tested by Illinois law where it was payable, it would be valid, but tested by Ohio law where it was executed, it would be void. The Court held the note valid. It was void where executed, but valid where payable, but since it was valid by *one* of these laws, it was a valid contract and could be enforced, even though invalid by the laws of the very state where the action was brought. The Court itself stated the principle very clearly: "Where such a contract, in express terms, provides for a rate of interest lawful in one but unlawful in the other state, the parties will be presumed to contract with reference to the laws of the state where the stipulated rate is lawful, and such presumption will prevail until overcome by proof that the stipulation was a shift to impart validity to a contract for a rate of interest in fact usurious."

On the whole subject therefore, we conclude that gen-

erally, a note whether secured or not, as to the question of usury, is governed by the law of the state where it is made. And if it is payable in another state, then its laws govern. But, as a special rule applicable only to notes, if it is void by one of those laws, but valid by the other, then it is governed by the law of the state under which it is valid, and it can be enforced universally on the ground of Comity.

Sec. 23. The special rule developed in the preceding section is exceptional. It confers upon negotiable paper, an extraordinary exemption from the ordinary applicable law, just as a concession to those particular forms of contract. It is, as has been said, a special rule. So that, if the note can be upheld by either the *lex contractus* or the *lex solutionis,* it is enforcible. Naturally, in deciding the validity of the note, we never consult the law of the forum, because the *lex fori* regulates the remedy to enforce it, and does not in any way determine its validity as to usury. Now, in view of all that has been said, it is clear that in the case of a note, the parties can agree that, although it is made in one state, it is to be payable in another, and of course in such a case it is governed by the law of the state where it is payable.

Occasionally however a different situation arises. That is, a note is made in one state, and is payable in another, but the note contains a *stipulation* that it is to be governed by the laws of a certain state. What law governs in that case? Is it the law of the state where it is executed? Or is it the law of the state where it is payable? Or is it the law of that state *stipulated* by the parties? Here again a second special rule has been developed. And that is that the parties to a note can set aside the ordinary law of the subject and substitute a stipulated law to govern the note. This cannot be done in any other form of contract. And when there is such a stipulation in the note, it governs; it regulates the rate of interest; and determines whether or not the paper is

usurious. By such stipulation they can therefore exclude the ordinary operative law, whether it be *lex contractus* or *lex solutionis,* and substitute their own stipulated laws thereby their rights are to be defined.

But this right in a note, to stipulate an applicatory law, is not absolute. The parties cannot consult the laws of every state in the Union, and then select the most liberal law and make it a part of their contract. Nor on the other hand, are they required in a note to submit it to the most severe of the state laws, and to make them a part of their contract, just because those laws are the laws of the state where it is made or is payable. The parties have a certain limited choice of laws. If there is a stipulation, it must be with reference to a law that bears on some element in the transaction. As we have said, they cannot select any state law. Nor are they required to accept the *lex contractus* or the *lex solutionis,* because the usury laws of these states may be harsh. They can select any law that pertains to some other element in the case, as for example, the law of the location, or the law of the domicile of one of them. So it is therefore, that in a note, if there is a stipulated law, it decides the question of usury, provided it is a law that has some actual and not merely fictitious relation to the facts in the case.

A good illustration of these principles is *U. S. Savings & Loan Co. v. Beckley,* 137 Ala. 119, 33 So. 934, in which A brought action in Alabama to have the Court adjudge a note and mortgage void for usury. The note and mortgage were executed in Alabama, payable in Minnesota, and contained a stipulation that "they were made with reference to the laws of Minnesota." The Court held that the note and mortgage were governed by the law of Minnesota, and not being usurious under its laws, there was no recovery. The Court here placed its decision on two distinct grounds. It held the contract was governed by the law of Minnesota *first,* because it was payable there, and *secondly,* because the stipulation required that the contract be governed by

Minnesota law. It emphasized, however, that Minnesota, the stipulated law, was the domicile of the Association that made the loan. And further, that it is the policy of such Associations in making their contracts in different states, for the sake of uniformity, to stipulate that they be construed by the laws of the state where it has its domicile.

So therefore, in conclusion, the parties to a note can stipulate a governing law and thereby exclude both the *lex contractus* and the *lex solutionis,* provided the stipulated law has reference to some element in the transaction. The right to stipulate such a law is therefore not absolute. It is relative. It is limited. It is restricted to notes, secured or not; and above all, it must be made in good faith, so that the parties refer to some law that has a direct reference to the contract.

Sec. 24. In the preceding section it was shown that the parties to a note can set aside the law that would otherwise govern. They can substitute a different law. They can stipulate that the note be governed by the laws of a specified state, and in such a case its laws determine whether the note is usurious. But, we said, the right to stipulate is not absolute. It is restricted. They cannot stipulate any law. They must stipulate a law that has reference to some element in the transaction, and if that is done in good faith, and not merely as a pretense to avoid the proper law, it is valid. So therefore, the stipulation must be in good faith. That is, even though they do agree on a law having reference to some element in the contract, there must be a satisfactory reason for selecting that law. In the case cited, they did stipulate their own law. That law did have reference to some element in the transaction. It had reference to the domicile of the Association that made the loan. But—here is the point—there was a *satisfactory basis* for stipulating that law, even though it had reference to the case. And that basis was that Minnesota was the domicile of the corporation. Its

laws governed it. Its laws defined its powers. Its laws were known to, and readily accessible by, the Association. And naturally, the Association preferred to contract with third parties in view of the laws that created it and defined its powers and would make uniform all its contracts, regardless of where they were made, in any state of the Union. It means something commercially to an Association that exists in one state but has an extensive and a diversified business in every state, to have a definite, standard contract with its clients.

So it is then that this case of *U. S. Savings & Loan Co. v. Beckley,* 137 Ala. 119, 33 So. 934 is absolutely sound. In fact, after the discussion we have had, it is superfluous to emphasize this requirement of good faith in connection with a stipulation. The author submits that a stipulation is made in good faith, when there is a sufficient reason for it in a note, as there was in the case cited. If there is no such sufficient basis for it, the stipulation is arbitrary, evasive, a subterfuge to escape the proper law, and will not be enforced.

Let us refer to another case in which this very state of facts occurred. In *Shannon v. Association,* 78 Mass. 955, 30 So. 51 the facts were that an Association that was created in Georgia did business in Mississippi. It made a loan to A who executed to it a note and real property mortgage in Mississippi as security. A made all payments due on the contract. Later however, he sued to recover a portion of the sums paid, alleging that the contract was usurious. The Court held he could recover. It held that the contract was governed by Mississippi law, where the notes were executed, and not by Georgia law, where it was stipulated they were to be paid, because the stipulation was not made in good faith. Now, this case is interesting. It is more so, because it is in contrast to the case previously cited. The cases are similar in their facts; *only,* in this case the stipulation was not bona fide. The Association here had only a *technical* domicile in Georgia. It incorporated there and immigrated to Mississippi, where the bulk

of its business was done. Hence, its *actual* domicile in a commercial sense, to be certain, was Mississippi, and when it stipulated with reference to the law of Georgia, that law had no actual relation to any element in the transaction. Hence, the stipulation was not made in good faith. Hence, it was inoperative. Hence, it did not determine the rights of the parties, and therefore the *proper* law was invoked, and it was the law of the state where the note was executed. The Court said: "Whenever under circumstances such as these, the foreign corporation thus localizing its business within the state has the payments made to the treasurer or secretary of a local board, the *real* intention of the parties is that the payments shall be made in this state, and the only purpose of reciting the contrary in the notes is to evade the usury laws of the state." And this very case supports the distinction suggested, that the good faith of a stipulation depends on whether it has a good purpose, when it says: "This holding in no way interferes with the right of a foreign corporation whose business has not been localized here, to make contracts with borrowers to be governed by the laws of the state of their domicile, if there be no purpose therein to *evade the usury laws* of this state." Therefore the parties to a note can stipulate a law to govern it. But they must stipulate a law that has reference to some element in the contract. And above all, the stipulation must be bona fide and not evasive, in that there *must be valid reasons* for selecting that particular law, such as commercial expediency.

SALES AND CHATTEL MORTGAGES

CHAPTER VII

Rule: THE RIGHTS OF PARTIES IN PROPERTY SOLD OR MORTGAGED ARE GOVERNED BY LAW OF THE STATE WHERE SUCH PROPERTY WAS LOCATED AT THE TIME OF THE SALE OR MORTGAGE,[1] BUT

Exceptions: IF PARTIES CONTEMPLATED ITS IMMEDIATE REMOVAL, OR, AGREED TO ITS SUBSEQUENT REMOVAL, TO ANOTHER STATE, IN SUCH CASES THE LAW OF THAT STATE IS APPLICABLE.[2]

Sec. 25. We are now prepared to consider the subject of Sales and Chattel mortgages, and to develop the special rules that govern them in the CONFLICT OF LAWS. This particular topic has been chosen, because it concerns rights under personal property contracts, and in addition, it regulates the rights of not only the original parties, but also of third parties.

1—French vs. Hall, 9 N. H. 137, 32 Am. D. 341; **GREEN VS. VAN BUSKIRK, 5 WALL. 307 (U. S.), 18 L. ED. 599, 19 L. ED. 109;** Ames Iron Works vs. Warren, 76 Ind. 512, 40 Am. R. 258; Marvin Safe Co. vs. Norton, 48 N. J. L. 412, 7 Atl. 418; Weinstein vs. Freyer, 93 Ala. 257, 9 So. 285; Hornthall vs. Burwell, 109 N. C. 10, 13 S. E. 74; Cleveland Mach. Works vs. Lang, 67 N. H. 348, 31 Atl. 20; **NAT. BANK OF COMMERCE VS. MORRIS, 114 MO. 255, 21 S. W. 511;** Adams vs. Fellers, 88 S. C. 212, 70 S. E. 722; Farmers & Merchants State Bank vs. Sutherlin, 93 Neb. 707, 141 N. W. 827; *Contra:* **CORBETT VS. LITTLEFIELD, 84 MICH. 30, 47 N. W. 581; SNYDER VS. YATES, 112 TENN. 309, 79 S. W. 796;** Boyer vs. Knowlton Co., 85 Oh. St. 104, 97 N. E. 137; *See:* **THURET VS. JENKINS, 7 MARTIN 318 (LA.), 12 AM. D. 508;** Whiston vs. Stadder, 8 Martin 95 (La.), 12 Am. D. 281; Schmidt vs. Perkins, 74 N. J. L. 785, 67 Atl. 77; Nat. Bank of Commerce vs. Jones, 18 Okla. 555, 91 Pac. 191.

2—Hervey vs. Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003; **BEGGS VS. BARTELS, 73 CONN. 132, 46 ATL. 874. JONES VS. FISH & OIL CO., 42 WASH. 332, 84 PAC. 1122.**

These two forms of Contract can be considered together. They both create rights in personal property. And they both involve the rights of not only the original parties, but also of third parties like creditors, mortgagees, and purchasers, who have, in some way, acquired an interest in the property sold or mortgaged. It is evident that these two transactions are not simple. But still, it is evident on the other hand, that being contracts, both of them, a sale and a mortgage, are as a general rule, governed by the laws of the state where each is respectively made. Hence, the rights of the original parties to a sale or a chattel mortgage depend on the law of the state where it is made.

But as a first preliminary question, where *is* a sale made? A sale implies a contract to sell property. But it is more. It implies the delivery of that property. Hence, the act of delivery completes the sale. Therefore, a sale is made in that state where the property is delivered. And consequently, being delivered in a certain state, and the sale being made in that state, the rights of the original subparties are governed by its laws. And, as another preliminary question, where is a *chattel mortgage* made? Unlike a sale, a chattel mortgage does not require delivery of the property. It simply requires delivery of the written mortgage, to constitute the contract. So therefore, since a mortgage requires delivery of the contract, it is made in that state where such delivery is complete. The delivery of a mortgage is generally known as "execution." "Execution" includes signing and delivery, and hence, the delivery of the mortgage is the execution of it. These terms are in law, synonymous. So it is therefore, that the rights of the original parties to a chattel mortgage are governed by the law of the state where it was executed. In sales or chattel mortgages, there is to a certain extent, an indiscriminate use of terms. The authorities state the general principle, but merely in a different way. Hence, the general rule is that the rights of the original parties to a sale or chattel mort-

gage are governed by the law of the state where the transaction was completed, by delivery of the goods in one case, or the execution of the writing in the other. There is certainly nothing extraordinary so far. These principles, we have just stated, are in reality taken from the general law of contracts. So that, as far as the *original* parties are concerned, that is, the seller and buyer or the chattel mortgagor and the chattel mortgagee, *as against each other,* there is *no* special rule applicable to these contracts, because contracts involving personal property are not distinguishable from any other contract in the CONFLICT OF LAWS.

But right here we begin our real special discussion. We now propose to consider the law that governs not the rights of the *original* parties, but the rights of *third* parties in property sold or mortgaged. A third party can acquire his interest either in the character of creditor, mortgagee or purchaser. Naturally, the law must consider his rights in disposing of a controversy respecting the property. But which state law decides his rights? Is it the law of the state where the sale or chattel mortgage transaction was completed? No, it is not. Since this third party is not claiming any interest under the contract, his rights should not be governed by the law of the contract. He did not participate in the contract. He is a stranger to it. Therefore, since he is not a party to the contract, he has no rights or obligations with respect to it, and consequently is not subject to the law that governs it. Clearly, the position of a third party is distinguishable from that of an original party to the contract. And certainly he is governed by *some* law. And what law is it? It is the law of the state where that property was located at the time of the sale or mortgage. In the CONFLICT OF LAWS personal property occupies a unique position. The law that governs it is not uniform in all transactions. It depends on the particular transaction in which the question arises. If it is a contract and the question arises between the original parties, their rights

are governed by the law of the state where the contract was completed, regardless of the location of the property. But, if the question arises between the original parties and a *third* party, then their rights are governed by the law of the state where the property was located at the time of the sale or mortgage, regardless of the law of the contract. That is, in a third party controversy, personal property has its own separate location. It is such a case, subject to the law of the state where it is located. And accordingly, those laws decide the rights of third parties in it. And why? Because, where the original parties contest their rights in personal property, the question between them is wholly *contractual* and since their rights in it depend on the contract, the law of the contract decides. But, where third parties assert title to property, the question in the case is not a contractual one. It is purely a *property controversy*. And being such, the title to that property is determined by the laws of the state where it was located. That distinction is sharply drawn throughout the whole subject. As against a third party it is wholly a property question. It presents an issue as to the title to personal property. Since each state has exclusive jurisdiction to determine title to personal property located within its limits, therefore the laws of that state where the property is located will be applicable. So therefore, in conclusion, the rights of the parties *as against third parties* in property sold or mortgaged, are governed by the laws of the state where it was located at the time of the transaction. When a sale or a mortgage is made, the location of the property at *that* time, definitely and permanently, fixes the relations of all those parties to it, regardless of a subsequent change in that location.

Now, let us refer to a leading case by way of illustration. In *Green v. Van Buskirk,* 5 Wall. 307 (U. S.) 18 L. Ed. 599, 19 L. Ed. 109, the facts briefly were that A executed a chattel mortgage in New York to B, on a certain safe, which however, was at the time lo-

cated in Illinois. The property in Illinois was later seized by A's creditors there under a writ of attachment and was sold for his debts. The question was, who is entitled to the property? The Illinois Court held that since at the time of the mortgage, the property was located in Illinois, the right of a third party in it was governed by its laws. Hence, A's creditors prevailed, and since the sale of the property by A's creditors was valid, they had good title and were not liable for conversion to B. This is a leading case, but unfortunately it does not fully discuss the main question involved. And that question was whether the rights of the parties in the property were regulated by New York or Illinois law. But apart from the opinion in the case, the ultimate principle was strongly upheld. And that is that the laws of the location were applicable. The case involved purely a question of title to the property. And that being so, it had to be decided by Illinois law where that property was located. And since under that law C had, by attachment, acquired a legal right in the property prior to B, C's rights were superior, and he was not liable when he had the property sold to pay a debt which was the basis of the attachment proceedings.

Now, another interesting case in which the facts were similar, but distinguishable, is *National Bank of Commerce v. Morris,* 114 Mo. 255, 21 S. W. 511. In that case A executed a chattel mortgage in Kansas to B covering certain live stock located in the State, B recording the transaction. Later how A, without the knowledge or consent of B, removed the cattle to Illinois, where he sold them to C, a third party. B, on learning of these facts, brought action in Missouri against C to recover their value. The decision of the case of course depended on who had title to the property. It was held that B could recover. The Court said: "The mortgage was duly executed and recorded in the state of Kansas, and all persons thereafter purchasing the cattle within the borders of Kansas were bound in law

to take notice thereof; and the same rule by virtue of Comity between the States, applied to the cattle in the state of Illinois." This case is absolutely sound. And it is simple in analysis. As shown by the facts, the mortgage was executed in Kansas; it was recorded in that state; and the property at the time was located within its limits. Therefore, B acquired valid right in it by his mortgage. Now, when the property was later removed to Illinois, his rights accompanied it there, and when C bought it, C bought it subject to B's preexisting title. In other words, the case like *Green v. Van Buskirk,* 5 Wall. 307 (U. S.), 18 L. Ed. 599, 19 L. Ed. 109 presented simply a question of title to the property. And being a question of title, it had to be decided by the law of the state where the property was located at the time of the mortgage. Now, since it had been at that time located in Kansas, therefore the rights of the parties were governed by Kansas law. And why did B prevail? Because, when the property was in Kansas he acquired a right in it by the execution and recording of the mortgage. And the subsequent removal of the property to Illinois did not divest his right because it was recognized in that state on the ground of Comity.

Now therefore, we can make a concluding statement. And that is, that if the title to personal property is in dispute between an original party and a third party, the law of the state where the property was located at the time of the sale of mortgage governs. If the property, as in *Green v. Van Buskirk,* 5 Wall. 307 (U. S.), 18 L. Ed. 599, 19 L. Ed. 109 was at the time in one state and the mortgage was executed in another state, the law of the location governs, and the third party prevails because the attachment gives him a prior title; and if, as in *National Bank of Commerce v. Morris,* 114 Mo. 255, 21 S. W. 511, the property was at the time in the state where the mortgage was executed, again the law of the location governs, but the mortgagee prevails because the mortgage gives *him* a prior title.

Naturally on principles of Comity, if a mortgagee or a creditor once, under the law of the location, acquires a valid prior title, the subsequent removal of the property to another state does not divest it. That is, a title that is once prior and vested by the law of the location retains its vested prior character, in spite of the change of location. Because, a title prior and valid in one state, is, on the principle of Comity, prior and valid in all states as against all other parties.

Sec. 26. In the preceding section it was shown that the rights of third parties in property sold or mortgaged are governed by the law of its location at the time of the sale or mortgage. And that party, whether he is one of the contracting parties or a third party, who obtains a prior vested right in the property by sale or mortgage or attachment, can assert it in another state to which it is subsequently taken.

Nor is that all. Other cases occur. That is, occasionally there is a case in which one party sells property located at the time in one state but agrees to its *immediate* removal to another state. In fact, that was the state of affairs in *Beggs v. Bartels,* 73 Conn. 132, 46 Atl. 874. In that case, A made a conditional sale in New York to B, of property at the time located in that state. But the agreement was, that B was to remove it *immediately* to Connecticut, and install it in his factory there, which was done. Later C, a creditor, attached it in Connecticut. And A sues to recover the value of it. The Court held there was no recovery, saying briefly that: "The contract was intended to have its operation on property situated in Connecticut." This case, just like the two others that we have discussed, involved not the right of one party to the contract against the other party, but simply a question of title. And when the title to personal property is in dispute between an original party and a third party, as it was in this case, the law that governs is the law of that state into which the property is to be immediately removed, where the parties had so agreed. By agreeing to remove it into

another state immediately, they subject it to the laws of that state, and contract in reference to those laws, and therefore actually eliminate the law of its original location as a factor in the transaction, substituting the law of the *proposed location* in its place. Hence, this case brings out a fine distinction. It holds that if at the time of the sale or mortgage, the parties agree to its *immediate removal* to another state, the laws of its proposed location govern. But this holding is not after all, technical. When a party agrees to the removal of property on which he had a lien, he thereby through his own voluntary act, submits it and his rights in it to the laws of the state into which it is taken. And if, as in this case, a third party acquires a prior right in it by attachment in that state, the third party prevails because the original party has waived his rights.

Now, this question of waiver comes up in still another form. For illustration, we can refer to *Jones v. Fish & Oil Co.*, 42 Wash. 332, 84 Pac. 1122. The facts were that A executed in Alaska, to B a chattel mortgage covering fish located there. Later A, with the *knowledge and consent* of B, removed the property into Washington, where it was seized by creditors. While the property was in Washington, B began proceedings to enforce his mortgage against the property. But the Court held he could not recover. It said: "A mortgage duly executed and recorded in one state is given effect in another state by virtue of the rule of Comity that exists between the states, and applies *only* in cases where the removal is *without the knowledge or consent of the mortgagee. Consent* by the mortgagee that the property may be taken from the situs of the mortgage *is a waiver* of the mortgage as against every person except the mortgagor; hence, a mortgagee who consents to the removal of mortgaged property from the situs of the mortgage, cannot be heard to insist as against strangers, that it has effect outside of its situs. So here, inasmuch as the mortgagee consented to the removal of the property from Alaska to this state, *he*

waived his mortgage, as against the respondents who seized the property as creditors of the mortgagor."

These two cases, that bear on the question of waiver, are sound law. They admit the general rule that the rights of the parties are governed by the law of the location at the time the property was sold or mortgaged. And hence, if under that law, the party acquires a valid title or lien in it, the subsequent removal of the property, to another state does not impair his rights. Under the rules of Comity, a right in property acquired under the laws of the location can be asserted in the property wherever it is taken. But here the cases diverge in their facts and in the law. That is, if, *prior* to the sale or mortgage, the party *agrees* to its immediate removal to another state, he thereby submits the property to its laws; he elects to have his rights determined by its laws; and if a third party in that state acquires there a right in it by attachment, the original party is precluded by his own waiver. And the identical principle applies if the party *consents* to the removal of the property *subsequent* to the sale or mortgage. In such a case, he thereby subjects the property to the law of the state into which it has been removed with his knowledge and consent. Consequently, he by his conduct, enables the party in possession of it to deceive and mislead a third party into the belief that he is the owner. When a creditor therefore seizes the property in that state, he acquires a prior valid lien against it, and the original party who created the deception is precluded from asserting the title he originally had. We have in that case, not only a waiver of his rights, but an actual estoppel to assert them. The cases are therefore based on the one fundamental proposition that a party validly acquiring a right under the laws of the state where the property was originally located can, by a waiver in one case or an estoppel in the other, lose that right if it is taken out of the state, either by his agreement before the transaction occurs, or by his consent after it occurs.

We can now generalize in conclusion. The rights of

parties in property sold or mortgaged are regulated by the laws of its location at the time the contract was made. If the original party therefore, acquires a right title or interest in the property by those laws, he can assert his rights against the property in any state into which it is taken unless, *first,* he either agreed to its removal before the sale or mortgage; or, *secondly,* unless he consented to its removal after the sale or mortgage, in either of which cases he is precluded from asserting his title on the principles of waiver and estoppel, to the prejudice of a third party.

MARRIAGE

CHAPTER VIII

Rule: THE VALIDITY OF A MARRIAGE IS GOVERNED BY LAW OF THE STATE WHERE IT WAS CELEBRATED.[1]

Rule: A MARRIAGE, VALID WHERE CELEBRATED, IS RECOGNIZED IN ANOTHER STATE,[2] BUT

Exception: IT IS NOT RECOGNIZED IF IT IS IN VIOLATION OF LOCAL PUBLIC POLICY.[3]

Rule: RIGHTS OF THE PARTIES IN MARITAL REALTY ARE REGULATED BY LAW OF STATE WHERE IT IS LOCATED.[4]

Rule: THEIR RIGHTS IN PERSONALTY ARE DEFINED BY LAW OF STATE IN WHICH THEY ARE DOMICILED.[5]

Sec. 27. Marriage has been defined as a status. That is, it is a personal relation created by a contract between the parties. And when the relation arises, the parties occupy a peculiar position in society generally. The legitimacy of children is involved; their rights in property are modified; and the state as a whole is interested in recognizing the validity of the marriage. And therefore, a marriage being created by a contract,

1—**MEDWAY VS. NEEDHAM, 16 MASS. 157, 8 AM. D. 131; ROCHE VS. WASHINGTON, 19 IND. 53, 81 AM. D. 376;** Commonwealth vs. Lane, 113 Mass. 458, 18 Am. R. 509; Crawford vs. State, 73 Miss. 172, 18 So. 848; State vs. Shattuck, 69 Vt. 403, 38 Atl. 81; State vs. Fenn, 47 Wash. 561, 92 Pac. 417; State vs. Hand, 87 Neb. 189, 126 N. W. 1002; *Contra:* **GREENHOW VS. JAMES, 80 VA. 636, 56 AM. R. 603;** *See:* **EARL VS. GODLEY, 42 MINN. 361, 44 N. W. 254; NORMAN VS. NORMAN, 121 CAL. 620, 54 PAC. 143: IN RE LANDO'S ESTATE, 112 MINN. 257, 127 N. W. 1125.**

2—Medway vs. Needham, 16 Mass. 157, 8 Am. D. 131; **COMMONWEALTH VS. LANE, 113 MASS. 458, 18 AM. R. 509;** State vs. Shattuck, 69 Vt. 403, 38 Atl. 81; State vs. Fenn, 47 Wash, 561, 92 Pac. 417; State vs. Hand, 87 Neb. 189, 126 N. W. 1002; In re Lando's Estate, 112 Minn. 257, 127 N. W. 1125.

3—Hyde vs. Hyde, L. R. 1 P. &. D. 130, 5 E. R. C. 833; Pennegar

is, as to its validity, governed by the law of the state where it is celebrated. That law governs not only its formal, but also its substantial requirements. It regulates the mode of solemnizing the marriage, and it determines the capacity of the parties to enter into that relation. So that in all respects, the validity either as to the form of the contract, or as to the capacity of the contracting parties, is regulated by the *lex celebrationis,* the law of the state where the marriage was celebrated. This general proposition is so thoroughly established as the law, that it would be superfluous to cite authority in its support. The question however was presented under a very peculiar state of facts, *In re Lando's Estate,* 112 Minn. 257, 127 N. W. 1125. In that case, the validity of the marriage arose on the application of A, a widow, for letters of administration in the estate of her deceased husband B. Both A and B had for a long time been residents of Minnesota. Later however, they separately migrated to Germany. While there they met, had a marriage ceremony performed, and subsequently cohabited as husband and wife. And hence, all the acts tending to establish a marriage transpired in Germany. Now, here is the interesting point of law in the case. The German Law provided substantially that the validity of a marriage should be determined by the law in force where the parties are domiciled. Hence, the Court, in deciding its validity here, indirectly had to determine it with reference to Minnesota law, where the parties had been

vs. State, 87 Tenn. 244, 10 S. W. 305; State vs. Tutty, 41 Fed. 755; In Re Stull's Estate, 183 Pa. St. 625, 39 Atl. 16; Lanham vs. Lanham, 136 Wis. 360, 117 N. W. 787; **WILSON VS. COOK, 256 ILL. 460, 100 N. E. 222.**

4—Besse vs. Pellochoux, 73 Ill. 285, 24 Am. R. 242; **RICHARDSON VS. DE GIVERVILLE, 107 MO. 432, 17 S. W. 974;** Long vs. Hess, 154 Ill. 482, 40 N. E. 335; *See:* De Pas vs. Mayo, 11 Mo. 314, 49 Am. D. 88; Brockman vs. Durkee, 46 Wash. 578, 90 Pac. 914.

5—SUCCESSION OF PACKWOOD, 9 ROBINSON, 438 (LA.), 41 AM. D. 341; *See:* **BROCKMAN VS. DURKEE, 46 WASH. 578, 90 PAC. 914.**

domiciled. And since it was valid by the German law where contracted, that is, the Minnesota law which the German law adopted, it was valid in Minnesota. This case therefore, by a species of legal circumnavigation, holds as is the general rule, that the validity of a marriage is regulated by the *lex celebrationis.* In fact, the Court said: "The validity of the marriage is to be determined by the law of Germany where is was celebrated. It is a generally accepted principle of interstate and international law, that the validity or invalidity of a marriage is to be determined by the law of the place where the ceremony is performed; that a marriage, legal where solemnized, is valid everywhere; and that a marriage void where it is celebrated is void everywhere."

Sec. 28. The preceding section has developed the general principle that the validity of a marriage depends on the law of the state where it was celebrated. In reality, it has developed another general principle, and that is, that if a marriage is valid in the state where celebrated, it is valid in all states. And that is the general rule. In no case is Comity more justified in the recognition of rights arising in another state, than in the subject of marriages. It is the policy of the law to sustain a marriage; preserve legitimacy; protect property rights; and promote its own social welfare, in recognizing as valid within its limits, a marriage celebrated under the laws of a neighboring state. So therefore, this general rule requires no vindication on social grounds.

The decisions that establish that general principle disclose some extreme cases in which the principle of Comity was applied just to uphold a marriage for the public good. As an example, there is *Commonwealth v. Lane,* 113 Mass. 458, 18 Am. R. 509. In that case, Massachusetts had a statute prohibiting the remarriage of a guilty divorced party; making such a marriage void; and adjudging the party guilty of polygamy for a viola-

tion. B was a divorced man; he withdrew from Massachusetts, and remarried in New Hampshire, where there was no such statute. On his return to Massachusetts he was indicted for polygamy. The Court held he was not guilty, because the validity of the marriage was regulated by New Hampshire law where it was celebrated. And being valid by the *lex celebrationis,* it was valid in Massachusetts under the general rule of Comity. The case is sound. It simply shows the lengths to which a Court will go in recognizing a marriage celebrated in another state and valid under those laws, although contrary to its own.

Sec. 29. But that general principle is subject to limitation. Certainly it is true that a marriage valid in one state is valid in all states. But it is truer still, that no state will recognize a marriage celebrated in another if such a marriage is in violation of its public policy. This is an abiding exception to the general principle of Comity, and it has a very decided application in the law of marriage. Hence, a marriage valid in one state is generally, but not necessarily, valid in another state. It is invalid if it infringes its own domestic policy. Now then, with respect to a marriage, when is it in violation of public policy? We know all states have marriage laws. And we know that those laws differ in the various states. And yet we also know that if a marriage is valid in one state it does not violate the public policy of another state *merely* because it would be void if celebrated there. Refer again to the case just cited, *Commonwealth v. Lane,* 113 Mass. 458, 18 Am. R. 509. In that very case, the Massachusetts Court upheld a marriage which, had it been solemnized in Massachusetts, would have been invalid. The mere fact that there was a difference on the subject of marriage between New Hampshire law and Massachusetts law, did not show that the marriage violated the local public policy of Massachusetts. Well then, if a difference in the law of the two states does not

show a difference in public policy so as to invalidate the marriage, how *is* public policy determined? To this difficult question we can give only a general reply. And that is, that if a marriage violates the laws of a state on *moral* grounds, it antagonizes its public policy and will not be recognized. In our discussion of Comity, we had occasion to discuss this identical principle. We stated that as a general rule a right arising in one state is enforcible in all states. But, we stated as an exception, a right will not be enforced if it violates local public policy. And we further stated that public policy is essentially a moral question. These general principles apply to marriages. A marriage celebrated in one state will not be recognized in another if its recognition would contravene the moral standards that prevail in the state.

But this introduces another problem. How do we determine the *moral* standards of a state? Naturally, by consulting its law, common and statutory, as a whole. Of course, there is considerable law on the subject of marriage. Not all of it declares a rule of public policy, in the restricted sense in which we are using the term here. If the law, whether it be a rule of the common law or the terms of a statute, embodies some definite *moral* principle; was intended to prevent some particular *social* evil; then that law declares a principle of public policy.

That public policy, as the term is used in the CONFLICT OF LAWS and especially in Marriages, is fundamentally a moral question, is directly held in *Wilson v. Cook,* 256 Ill. 460, 100 N. E. 222. The validity of the marriage arose in dower proceedings. Illinois had a statute prohibiting the remarriage of either party to a divorce; making such a remarriage void; and adjudging a party violating it guilty of bigamy. The defendant A, who had obtained a divorce in Illinois, withdrew to Missouri where he remarried, and later returned to live in Illinois. The Court held that the Missouri marriage was void, because in violation of

the public policy of Illinois, as declared by the statute. And the Court expressed its opinion in these words: "Where a state has enacted a statute lawfully imposing upon its citizens an incapacity to contract marriage by reason of a positive *policy of the state for the protection of the morals and good order of society against serious social evils,* a marriage contracted in disregard of the prohibition of the statute, wherever celebrated, will be void." So therefore, in this case it was held that, although the marriage was valid in Missouri where it was celebrated, it was void in Illinois where its validity was questioned, because in violation of its local public policy. That is, it not only violated its laws, but it transgressed its moral precepts as evidenced by those laws, and was therefore invalid.

Now, on again referring to the previous case of *Commonwealth v. Lane,* 113 Mass. 458, 18 Am. R. 509 we find a very similar state of facts. And yet there the Court held that the marriage was valid and did not violate public policy. Are these decisions reconcilable? Yes, but they involve a fine distinction. It is this: in the law of marriage there is a difference between a *disability* and a *penalty.* Both of course, are imposed by statute. A disability prohibits a marriage and makes it void. And if the party contracts a marriage in violation of it, either in the state or out of the state, the marriage is void as against public policy. And a disability, it is to be noted, is an incapacity that operates on *both* parties to the marriage. Those principles were applied in *Wilson v. Cook,* 256 Ill. 460, 100 N. E. 222 where the statute imposed an incapacity to marry on both parties, and hence it was a disability, and therefore made the marriage void whether contracted within or without the state. On the other hand, a penalty is different. A penalty prohibits a marriage and makes it void. And if the party contracts a marriage in violation of it *in* the state, the marriage is void. But here is the material point. A penalty is an incapacity that operates only on *one* of the parties as a punishment for his guilt in the divorce. The statute

in such a case is therefore *punitive,* and involves no question of morals or public policy, except in an indirect way. And being penal, the statute operates locally only in the state that enacted it. It has no exterritorial effect. It does not operate on the party when he withdraws and contracts a marriage in another state. When he therefore marries in that state, he is under no disability or incapacity *there,* and the marriage is valid. Being valid in such a case by the *lex celebrationis,* it is valid in the state whose very laws the party has successfully and contemptuously evaded. And that was the identical situation in *Commonwealth v. Lane,* 113 Mass. 458, 18 Am. R. 509. The statute in that case prohibited the *guilty* party only, to marry. Its purpose was simply to penalize him for his adultery. There was no general moral policy behind that statute. And acting on him alone, it imposed a penalty which prohibited him from marrying only in Massachusetts. Hence, when he withdrew to New Hampshire and married, he was no longer subject to the penal incapacity of Massachusetts; the marriage was valid in New Hampshire; and being valid in that state, the *lex celebrationis,* was upheld in Massachusetts on the ground of Comity.

And here we can generalize this branch of the subject before discussing the law of marital property. The general rule is that the validity of a marriage is governed by the laws of the state where it is celebrated. If it is valid there, it is valid in all states under the rules of Comity. But as an exception, such a marriage will not be recognized if it violates local public policy. And lastly, if a party under a penal incapacity contracts a marriage in another state in evasion of his own state law, the marriage will be recognized, because a penalty against marriage has no operation outside the state that imposes it.

Sec. 30. In the foregoing discussion, we presented the law that governs marriage as a purely personal relation. We now propose to develop briefly the principles that govern the property relations of husband and wife. It

has been said that marriage creates property rights. That is, both during the marriage and after its dissolution, each party has by law, certain rights in the personal or real estate of the other. But the laws of the states differ. Some states are liberal with the husband. Others are liberal with the wife. Some make a distinction as to the nature of the property, while others do not. In other words, there is a considerable CONFLICT OF LAWS respecting the marital rights of husband and wife. Now then, if a controversy arises between them as to their respective rights in property, which law prevails? Of course, it is evident after our discussion of CONFLICT OF LAWS so far, that there is a vital distinction between real and personal property. Real property is fixed and stationary. It is necessarily local. The rights of parties in it are always governed by the law of the state where it is located, because it is exclusively subject to those laws. This rule is universal. There are no exceptions to it. Hence, the rights of the parties in marital real estate are always determined by the law of the state where it is located. Being located in a certain state, it is within the limits of that state; and being within its limits, the rights of the parties in that property are defined by the *lex loci rei sitae,* the law of its location. This general principle is so very simple that it does not require illustration. In fact, the general rule is so absolute in its scope and so unyielding in its operation, that the parties cannot by their own contracts, substitute another law to govern their real property rights. It is a rule in the CONFLICT OF LAWS, that the jurisdiction of the state where the real property is located, to define the marital rights of the parties is exclusive. It cannot be modified by the parties.

The principle was applied in *Richardson v. Degiverville,* 107 Mo. 432, 17 S. W. 974. The facts were briefly, that the parties prior to their marriage in France, made an antenuptial contract in which it was agreed that all personal property acquired by them was to be regarded

as the community property of both and not the separate property of each of them. The parties subsequently removed to Missouri where the wife owned real property. Under the Missouri law in such a case, the husband had a life estate in such property. The wife however, by an agent, agreed to sell the property to A, the plaintiff in the action, and on her refusal to convey, he brought specific performance. The Court held he could not recover. It said that the property was owned not by her alone, but jointly with her husband. That is, since the real property was located in Missouri, the rights of the parties therein were regulated by Missouri law, and under that law husband and wife owned the property together. Consequently, the wife alone could not make a valid contract to sell it, and specific performance could not be enforced. The decision is sound. It is instructive because the facts showed both real and personal estate was involved, but of course, only the realty was in dispute. The Court was right in holding that the rights of the parties in marital real property are regulated by the law of its location. And further, I believe it can be deduced, not only does that law govern their rights, but they cannot by contract, agree that their rights in real property be governed by any other law. Because, as has been stated, real property is stationary. It is in fact a physical part of the state in which it is located; it is therefore subject to the laws of that state only; and no contract between the parties can exclude its jurisdiction with respect to it.

Sec. 31. The rights of the parties in marital personal estate however, are entirely different. Personal property occupies a unique position in the CONFLICT OF LAWS. It is not subject to any uniform rule. In some cases, it is subject to the laws of the state where it is located. But in others, it is governed by the law of the owner's domicile. And this is the principle that applies in deciding rights in marital personalty. This law of the domicile is applicable not only with reference to

rights during the marriage, but also with reference to rights in such property on the death of one of the parties. In other words, in the law of marriage the location of personal property is in the state where its owner is domiciled. He can be domiciled in one state, and the property be actually in another state, and still, by force of this legal fiction, its legal location is where he is permanently and actually a resident. There was a time in the history of the CONFLICT OF LAWS when the domicile of the owner fixed the location of personal property for *all* purposes. But that once universal rule is now only general. So that by legal fiction, since personalty is movable and portable and generally follows its owner, the law imputes to it a location for marital purposes, in that state where he is domiciled. So therefore, the rights of one party in marital personalty owned by the other, are regulated not by the law of the state where it is actually located, but by the law of that state where it is fictitiously located, that is, at the domicile of its owner, be it husband or wife, because they have a common identical domicile in marriage. That is the general law on the whole subject.

But a few more words can be said. It has been stated that personal property is movable, and portable and is occasionally taken out of the state where the owner is domiciled, into another state. This, of course, does not change the situation in law. It is clear, as has been shown, that the rights of a wife in the husband's personal estate are governed by the law of the state where he was domiciled *at the time* he acquired it. A valuable decision in which this phase of the subject was involved is *Depas v. Mayo,* 11 Mo. 314, 49 Am. D. 88. The facts were that A and B married parties, were domiciled in Louisiana. By the laws of that state, B, the wife was entitled to a half of all the personalty owned by A the husband. He acquired a considerable sum of money in Louisiana, and taking it with him went to Missouri, where he purchased a piece of real property. She sued in Missouri by an equity action to establish a trust

against it. The Missouri Court held she could recover. It held that the parties were domiciled in Louisiana; by the law of the domicile, the wife had title to one half the money; that when the husband removed it to Missouri she retained her title; and that investing it in real property there simply changed its form, but did not divest the rights she already had under the Louisiana law. The case of course involved real property. But she did not assert her rights in it as *real* property. She contended that in its original form as personalty she had title to one half; that that title being vested in Louisiana, the law of the domicile, was not divested by removal to Missouri; and that an unauthorized change of it into real estate did not alter the transaction. That case is good law. It is authority in affirming that the marital rights of the parties in personalty are regulated by the law of the domicile. And it is also authority in declaring that the marital rights of the parties in personalty are governed by the law of the domicile *at the time* the property was acquired. And finally it is authority in deciding that if, by the domiciliary law, a right has vested in one state, it can be asserted against the property either in its original *or in its changed* form in any other state, under the omnipotent principle of Comity.

LEGITIMACY AND ADOPTION

CHAPTER IX

Rule: THE LAW OF THE STATE WHERE THE INFANT IS DOMICILED, DETERMINES VALIDITY OF LEGITIMACY OR ADOPTION.[1]

Rule: SUCH LEGITIMATE OR ADOPTED CHILD CAN ASSERT IN ANOTHER STATE, ALL THE LEGAL RIGHTS THAT LOCAL LAWS GRANT TO DOMESTIC CHILDREN.[2]

Sec. 32: The CONFLICT OF LAWS extends its application to every subject in the law. We have selected a few of the particular subjects however, which because of their difficulty and their practical importance, require special attention. Among them are the topics of Legitimacy and Adoption. No doubt, we have all studied Domestic Relations. We have learned that every person has a status in the law. That is, every person is legally classifiable as either an adult or an infant. And if he is an infant, he is of course generally a natural born legitimate child. But that is not always the case. Some infants are illegitimate. And others are merely adopted. These various forms of infancy differ from each other

1—Smith vs. Kelly, 23 Miss. 167, 55 Am. D. 87; Blythe vs. Ayres, 96 Cal. 532, 31 Pac. 915; **FOWLER VS. FOWLER**, 131 N. C. 169, 42 S. E. 563; **IRVING VS. FORD**, 183 MASS. 448, 67 N. E. 366. *See:* Greenhow vs. James, 80 Va. 636, 56 Am. R. 603; Earl vs. Godley, 42 Minn. 361, 44 N. W. 254.

2—Smith vs. Kelly, 23 Miss. 167, 55 Am. D. 87; **ROSS VS. ROSS**, 129 MASS. 243, 37 AM. R. 321; Dayton vs. Adkisson, 45 N. J. E. 603, 17 Atl. 964; Earl vs. Godley, 42 Minn. 361, 44 N. W. 254; Fowler vs. Fowler, 131 N. C. 169, 42 S. E. 563; Irwing vs. Ford, 183 Mass. 448, 67 N. E. 366; Schick vs. Howe, 137 Ia. 249, 114 N. W. 916; *Contra:* Succession of Petit, 49 La. Ann. 625, 21 So. 717; **BROWN VS. FINLEY**, 157 ALA. 424, 47 SO. 577; *See:* Blythe vs. Ayres, 96 Cal. 532, 31 Pac. 915.

in respect of personal and property rights. So therefore, it is a vital question in many a case as to the actual status of a person. And if his status is to be determined, which law determines it? Naturally there can be but one reply to this question. And we have in our antecedent discussion of Contracts, indicated the solution of the problem. In discussing Contracts, we said incidentally, that the status of a person is always determined by the law of the state where he is domiciled. Here, we affirm that principle directly. And why is the domiciliary law operative? Because the status of a person involves his personal standing in the community. It decides primarily his legal personal condition with respect to all others. The law assigns to all persons a definite status. That is, it decides whether they are adult or infant. And if infant, it classifies them into legitimate, illegitimate and adopted. And having made the proper classification, it confers on them certain rights and invests them with certain disabilities. So it is therefore, that the status of a person is fixed by law. And it is fixed by the law of his domicile, because it determines his personal rights and obligations with respect to others. Hence, the identification in the CONFLICT OF LAWS, of status with domicile.

Now then, since the status of a person is fixed by the law of his domicile, where *is* his domicile? This is a preliminary question in all problems of legitimacy and adoption. The status of a child depends on the law of his domicile, but the location of the domicile is necessary to a decision as to whether he is illegitimate, legitimate or adopted. In reference to infants, as a general rule, the domicile of an infant is that of his father. The infant, to begin with, because of his infancy, is under a legal disability. He cannot establish his own separate domicile; that is the exclusive right of the father. The father has custody of him, and can therefore create a domicile of his own choice, and when he has done so, the domicile of the infant is fixed there by necessity. So then, the domicile of the infant is

the domicile of his father. And when the father changes his own domicile, he necessarily changes the infant's domicile, because it is derivative and accompanies that of the father, regardless of the physical residence of the infant. And if the father is dead, since the right of custody survives to the mother, her domicile fixes the domicile of the infant on similar grounds. So, generally speaking, the domicile of the infant is in that state where the father has his permanent actual residence. And if he is deceased, it is in that state where the surviving mother has retained or established a permanent domestic establishment. These principles are elementary.

As a result, if the question in a case is, what is the status of the infant, the law of the domicile must be consulted to determine legitimacy or adoption. Because, that law, the domiciliary law, fixes his status, and consequently decides whether he possesses one or the other of these forms of personal capacity. Hence, to speak in concrete terms, if a child is a resident of Virginia, but legally domiciled in Massachusetts, because its father is domiciled in that state, whether it is a legitimate child or not, is determined by Massachusetts law. Those were the facts in *Irving v. Ford,* 183 Mass. 448, 67 N. E. 366. It further appeared in the case, that by Virginia law where the child was physically resident, mere recognition of an illegitimate child made it legitimate; whereas by Massachusetts law, where the father was domiciled, recognition and marriage of the mother were both essential to legitimation. The child brought an action in Massachusetts to recover a distributive share in the estate of its deceased father. And the question thereupon was, whether it was legitimate. Since legitimacy is determined by the law of the father's domicile; and the law in force in Massachusetts required recognition and marriage combined; and these acts were not done, there was no legitimation in accordance with the *lex domicilii,* and therefore the child was held illegitimate and had no right to inherit. The case is especially

interesting, because the child was an actual resident of Virginia; and since its laws regarded mere recognition as a legitimation, he would in Virginia be a legitimate child, had its laws governed the case. With reference to this branch of the case however, the Court said: "If by the law of the fathers domicile, legitimation is not the result of the acts claimed to have that effect, though, under the bastard's domiciliary law, legitimation would result therefrom, the status of legitimation should not be conferred upon the bastard, for that would be to subject the status of the father to a law to which it is not properly subject."

The decision is unimpeachable. It enforces very strictly the general principle that the status of an infant is regulated exclusively by the law of the state in which he is legally domiciled. The laws of the father's domicile alone must be consulted to determine what acts are necessary to legitimate an infant; and if those laws require certain acts, and they are not done, the child never attained the status of legitimacy. Naturally, the general principle governs adoption proceedings. Here also, we have simply another application of the domiciliary law. So therefore, the question as to whether an infant has been validly adopted depends on the laws in force in its legal domicile.

Sec. 33. In the preceding section, it was shown that the domicile of an infant is in that state where the father has established a permanent legal residence. And it was also shown that the law of the state in which he is domiciled determines whether he is legitimate, illegitimate or adopted.

We now take up the second phase of the subject. It can be stated in interrogatory form: If an infant is domiciled in one state and legitimate or adopted under its laws, can he go into another state and assert there all the personal and property rights its laws confer upon domestic children? The Massachusetts Court was confronted with this problem in the case of *Ross v. Ross,*

129 Mass. 243, 37 Am. R. 321. The facts were that A, an infant was domiciled in Pennsylvania, where he resided with his parents. Later however, he was adopted by C, by regular judicial proceedings had in Pennsylvania. C died some time afterward, and A, the infant sues to recover an intestate share in real property owned by C in Massachusetts. The Court held C could recover. It held that C was domiciled in Pennsylvania; that he was adopted regularly under its laws; that he thereby acquired the status of an adopted child there; and being adopted in one state, his status of adoption would be recognized in Massachusetts on principles of Comity. To use the Court's own language: "We are therefore of the opinion that the legal status of the child of the intestate, once acquired by the demandant under a statute and by a judicial decree of the state of Pennsylvania, while the parties were domiciled there, continued after their removal into this Commonwealth, and that by virtue thereof, the demandant is entitled to maintain this action."

A few words of explanation are necessary however, before we conclude this subject. It is to be noted that the infant asserted his *status* as an adopted child by virtue of Pennsylvania law; but, he was given the right to *inherit the real property* by virtue of Massachusetts law. That is, his status as an adopted child was recognized in Massachusetts, and recognizing that status, the Massachusetts Court recognized all its *incidents* as defined by its own laws and one of those *incidents* was the right of inheritance. Therefore, his status was of Pennsylvania origin, but his right to inherit was derived *directly* from the Massachusetts law; and he was allowed to recover the property because by *coincidence,* Pennsylvania law conferred the right of inheritance on all adopted children.

The case is the leading American authority. It contains an exhaustive discussion of the law in reference to adoptions and the consequent rights of adopted children in the states of the Union. There is no more

instructive decision in all the Reports than the *Ross* case. So then, in conclusion, a status validly acquired in one state will be recognized in all other states; and incidentally, the infant will be given under the local laws, all the rights, but be subject to all the disabilities, of domestic children; proving, as was insisted in our early discussion of Comity, that its principles pervade the whole subject of the CONFLICT OF LAWS.

of the state where it is located; because being located there, it is subject to its laws; and being subject to its laws, title to it is governed by those laws exclusively.

But the foundation of the general rule in reference to personal property is entirely different. In the CONFLICT OF LAWS personal property is, by a legal fiction, deemed to be located in that state where the testator is domiciled, regardless of where the property is actually located. That is, the fiction dominates the fact. And its basis is, that since personal property is movable and portable and generally located where the owner is domiciled, it is regarded as being in that state with him, and therefore subject to the domiciliary law. So therefore, all questions in Wills that pertain to personal property are governed by the law of the state where the testator was domiciled.

This question arose in *Cross v. U. S. Trust Co.,* 131 N. Y. 330, 30 N. E. 125 in which the facts were, that a testatrix domiciled in Pennsylvania made a will disposing of considerable personal estate located in New York. Some time after her death, an action was brought in New York to have a trust in the will declared void, because it violated the law of New York, although it was valid by the Pennsylvania law. The Court dismissed the action. It was held that it was a will of personal property; that its validity in whole or in part was governed by the law of the testator's domicile; and being valid there, would be recognized as a valid testamentary disposition of the property, although it was actually located in New York. Now, there is another interesting point in the case. The plaintiffs having failed to set aside the will on the ground that it did not comply with the New York law, sought to impeach it on another ground. They contended that even though it *was* valid by the domiciliary law of Pennsylvania, it should be held invalid in New York because contrary to its public policy. But there again the Court decided against them. It held that since it was valid in Pennsylvania, it would be recognized as valid in New York; and further, that it

ERRATUM

TIERNAN CONFLICT OF LAWS.

Read page 94 as page 95 and vice versa.

WILLS

CHAPTER X

Rule: THE VALIDITY, CONSTRUCTION AND REVOCATION OF A WILL ARE REGULATED BY LAW OF TESTATORS DOMICILE IF IT INVOLVES PERSONALTY; OR THE LAW OF THE LOCATION IF IT INVOLVES REALTY.1

Rule: THE RIGHT OF ELECTION UNDER A WILL, WHETHER OF REALTY OR PERSONALTY, IS DETERMINED BY LAW OF TESTATORS DOMICILE.2

Sec. 34. The CONFLICT OF LAWS with reference to Wills can be simplified considerably by the statement of two general propositions. One is, that all questions that pertain to a will of real property are governed by the law of the state where it is located. And the other is, that all questions that pertain to a will of personal property are governed by the law of the domicile. Of course, those two general rules do not require extended discussion. As regards realty, all questions in Wills that pertain to it, such as its validity or revocation or construction, are governed by the law of the location. There is no exception to this general rule. It is a principle of jurisdiction that the title to real property, derived from a will, is regulated by the law

1—**CROSS VS TRUST CO.**, 131 **N. Y.** 330, 30 **N. E.** 125; In Re Ferguson's Will (1902) 1 Ch. 483, 2 B. R. C. 552; **CASTENS VS. MURRAY, 122 GA.** 396, 50 **S. E.** 131; Mount vs. Tuttle, 183 N. Y. 358, 76 N. E. 873; **PEET VS. PEET, 229 ILL.** 341, 82 **N. E.** 376; *(Contra:* **LINCOLN VS. PERRY,** 149 **MASS.** 368, 21 **N. E.** 671); *See:* **AMER. BIBLE SOC. VS. HEALY,** 153 **MASS.** 197, 26 **N. E.** 404; **HOPE VS. BREWER,** 136 **N. Y.** 126, 32 **N. E.** 558; Northwestern Mas. Aid. Ass'n vs. Jones, 154 Pa. St. 99, 26 Atl. 253; Brandeis vs. Atkins, 204 Mass. 471, 90 N. E. 861.

2—Douglas-Menzies vs. Umpheby, (1908) A. C. 224, 3 B. R. C. 509; **MARTIN VS. BATTEY,** 87 **KANS.** 582, 125 **PAC.** 88.

was *not* contrary to its public policy. With respect to this branch of the case it was said: "It does not follow that a trust created by the laws of another state is contrary to our public policy with respect to accumulations and the suspension of the absolute ownership, simply because the law of that state *differs* in some respects from ours." And again: "When an instrument affecting the title to personal property, valid in its origin, is sought to be set aside on the ground that it is in some way contrary to our laws, a *clear case* must be established." So therefore, the case cited is a sound application of the general rule that the validity of a will of personalty is governed by the law of the domicile. It goes further. It holds that the domiciliary law governs even though the personal property is located in a different state. It goes further still. It decides that the domiciliary law governs even though it makes a disposition of the property which if made under the laws of the state where it is located, would be absolutely void.

An interesting case in which real property, on the other hand, was involved is *Peet v. Peet,* 229 Ill. 341, 82 N. E. 376. The facts in brief, were that the testator was domiciled in New York, while the real property was located in Illinois. A, a child of the testator, brought action in Illinois to recover an intestate share of the property, alleging that the will had been revoked by his birth after it had been executed, since he was not mentioned or provided for in it, as prescribed by the New York laws. The Court, however, dismissed the proceedings. It held that, whether the child had been mentioned or provided for in the will presented a question of *construction;* that, being a will of real property, its construction is to be governed by the law of the *location;* that, under the construction of the will as it was interpreted by Illinois laws, the child had been actually mentioned and provided for, in the light of parol evidence introduced at the trial; and therefore, there was no revocation under the Illinois Statute, which was similar to, but in that respect different from, the New

York Statute. The decision cannot be questioned. It establishes the general principle that the construction of a will of real property is governed by the law of the state where it is located. In this case the *construction* of the will was the vital question in the case. Interpreting it in the light of domiciliary New York law, the Court would have held that it had been revoked by the birth of the child, because not mentioned or provided for *in the will.* On the other hand, construing it in the light of the local Illinois law, the Court held there was no revocation under *its* Statute, because parol evidence which it allowed, but which the New York Statute excluded, showed that the child had been mentioned and provided for *in another way,* and therefore there was no revocation. Without further discussion of authority, it is clear that in testamentary law, there is a fundamental distinction between realty and personalty. Hence, while questions relating to realty are governed by the law of the location, questions pertaining to personalty are governed by the law of the domicile.

Sec. 35. And yet, in spite of the foregoing distinction in reference to real and personal property, peculiar cases arise in which the application of one or the other of these two general rules is very difficult. For example, there is the subject of testamentary election. In our study of Equity, we learned that the principle of election in Wills means that the will gives a party a choice between two things, the provisions under the will or his intestate share under the law. The will provides that he is to take one or the other. If he takes one he can therefore not take the other, because he is required to elect, by choosing between them. The will is an entirety. He either takes under it or he does not. If he takes under it he must accept the burden with the benefit. He is required to elect. Taking the provision under the will, he repudiates the intestate share under the law; he has elected to accept the one and elected to reject the other; and having done so, he is estopped to deny that

he has accepted the one and rejected the other. So that an election once made is final and binding, and gives him title to the property chosen; but denies him title to the property rejected.

But it is superfluous for us here to discuss the principle of election in its general aspects. We are interested simply in the CONFLICT OF LAWS and how it operates where a case of election is presented. And we will say here that the CONFLICT OF LAWS operates very anomalously where there is a case of election. That is, to a certain extent, it ignores the general distinction between real and personal estate. It is a law unto itself in this subject. For example, the principle of election was involved in *Martin v. Battey,* 87 Kans. 582, 125 Pac. 88. The facts in substance were that A, the testatrix, domiciled in Illinois, died in that state leaving real property located both in Illinois *and* Kansas. The will gave the husband a life estate in all the property and the remainder in fee to the heirs, the original will being probated in Illinois, and the copy in Kansas under a special law in force there. After the death of the testatrix, the husband went into possession of the property in Illinois under the will; thereby electing to accept it and consequently deciding to reject his intestate share in that state, since in his estimation, the will was more favorable to him than the law. *But,* in Kansas where the other piece of real property was located, the intestate share was more preferable than the share under the will. Consequently the question in the case was, having elected *under* the will in Illinois can he elect *against* the will in Kansas? Or in other words, is an election made under the domiciliary law conclusive in all other states? Or in still a different form, which law governs an election, the law of the domicile or the law of the location? That was the only question in the case. The Court held that in the CONFLICT OF LAWS, the right of election is governed by the law of the domicile. It is not governed by the law of the location.

An election validly made in the state where the tes-

tator was domiciled, is conclusive against the beneficiary in all states, regardless of whether it pertains to real or personal estate, or both. Certainly that is a special rule in the CONFLICT OF LAWS. But its basis is found in the principles of Equity. A will is an entirety. It is not legally divisible. A beneficiary cannot divide it into parts, so as to accept it in one state and repudiate it in another. Certainly the technical presence of real property cannot alter the case as to him. There is the all powerful rule of estoppel, that in the face of *all* legal principles, insists that if a party accepts a will in one state he has accepted it in all states, because it is not capable of severance in order that it be given a different operation in those states, and in that way an endless confusion arise and the intention of the testator be defeated. So it is therefore, that in respect of election, a subject upon which this very case shows there is *one* rule of certainty that rises above the technicalities of the CONFLICT OF LAWS, it must be made under the domiciliary law. If made there, it is an election in all states, regardless of the general dispersion of the real property among them. The unity of the will, the certainty of its operation on all property and in favor of all persons; and the equity of compelling the party to abide by the will as he has elected to do, are all arguments of convenience and expediency and *policy,* that ought to prevail against the technical doctrine that the laws of the location should govern questions in reference to wills of realty.

CRIMES

CHAPTER XI

Rule: A CRIMINAL PROSECUTION MUST BE BROUGHT IN THE STATE WHERE THE CRIME WAS COMMITTED.[1]

Rule: A CRIME IS COMMITTED IN THE STATE WHERE THE LAST ESSENTIAL ACT IS DONE.[2]

Rule: CONSPIRACY IS COMMITTED IN THE STATE WHERE THE CRIMINAL AGREEMENT IS COMPLETED.[3]

Rule: HOMICIDE IS COMMITTED IN THE STATE WHERE THE FATAL INJURY WAS RECEIVED.[4]

Rule: LARCENY IS COMMITTED IN EACH OF THE STATES FROM, THROUGH, OR INTO, WHICH THE STOLEN PROPERTY IS TAKEN.[5]

Sec. 37. Our discussion so far has developed the principles of the CONFLICT OF LAWS in relation to civil

1—State vs. Chapin, 17 Ark. 561, 65 Am. D. 452; **STATE VS. CUTSHALL, 110 N. C. 538, 15 S. E. 261;** *See:* State vs. Lowe, 21 W. Va. 783, 45 Am. R. 570.

2—**PEOPLE VS. ADAMS, 3 DENIO 190 (N. Y.), 45 AM. D. 468;** State vs. Chapin, 17 Ark. 561, 65 Am. D. 452; **SIMPSON VS. STATE, 92 GA. 41, 17 S. E. 984; STATE VS. GRUBER, 116 MINN. 221, 133 N. W. 571:** *See:* Connor vs. State, 29 Fla. 455, 10 So. 891; State vs. Hudson, 13 Mont. 112, 32 Pac. 413.

3—**EX PARTE ROGERS, 10 TEX. CR. APP. 655, 38 AM. R. 654;** *See:* **STATE VS. CHAPIN, 17 ARK. 561, 65 AM. D. 452.**

4—**GREEN VS. STATE, 66 ALA. 40, 41 AM. R. 744;** United States vs. Guiteau, 1 Mackey 498 (D. C.), 47 Am. R. 247; State vs. Kelly, 76 Me. 331, 49 Am. R. 620; **STATE VS. HALL, 114 N. C. 909, 19 S. E. 602;** *See:* People vs. Tyler, 7 Mich. 161, 74 Am. D. 703; Commonwealth vs. Macloon, 101 Mass. 1, 100 Am. D. 89; **EX PARTE McNEELY, 36 W. VA. 84, 14 S. E. 436;** Commonwealth vs. Jones, 118 Ky. 889, 82 S. W. 643.

5—Hemmaker vs. State, 12 Mo. 453, 51 Am. D. 172; **STATE VS. KIEF, 12 MONT. 92, 29 PAC. 654;** *Contra:* Lee vs. State, 64 Ga. 203, 37 Am. R. 67; **STROUTHER VS. COMMONWEALTH, 92 VA. 789, 22 S. E. 852;** Brown vs. United States, 35 App. Cas. 548 (D. C.), Ann. Cas. (1912) A. 388. *See:* State vs. Underwood, 49 Me. 181, 77 Am. D. 254; State vs. Cummings, 33 Conn. 260, 89 Am. D. 208; People vs. Brock, 149 Mich. 464, 112 N. W. 1116; Ex parte Sullivan, 84 Neb. 493, 121 N. W. 456.

actions. We are now prepared to discuss Crimes; and to show by principle and concrete decision, the law as it effects Criminal Actions. And here the author, by personal intrusion, again suggests, that in spite of the technicality and the difficulty and the uncertainty of this branch of our subject, still it is reducible to certain fundamental principles that can be directly stated. As in the history of society, so in the history of the Law, crime has played a leading part. In fact, the very conception of a crime is that it is an act that injures, not the right of the individual, but the peace and the security and the dignity of the State, which is simply society in its organized form. So it is then, that the essence of crime is that it is an act in violation of the laws of the State where it was committed. And being in violation of those laws, it's commission inflicts a direct, permanent injury on that State. Nor is that all. Being a violation of the law of a State, it injures the sovereignty of that State, and acts detrimentally to its people. Beyond that, however, there is no harm. It is not a violation of the law of another State; nor is it injurious to the sovereignty of another State, nor are the people of another state affected by it, only in a very indirect way. Consequently a crime being local, is injurious locally in that State where it was committed; and therefore, our first general principle is, that the criminal prosecution must be brought in that State where the Crime was committed. This is in truth more than a general principle. Since a crime is local and therefore must be redressed by local action, it is not subject to the doctrine of Comity; so that if a crime is not redressed locally in the State of its commission, it can not be prosecuted in any other State, because of its territorial nature.

Let us refer briefly to a leading case, *State v. Cutshall,* 110 N. C. 538, 15 S-E 261. In that case, the defendant was indicted for bigamy in North Carolina; was a married man; and left the State going to South Carolina where he contracted a remarriage. The North Carolina

Court decided he was not guilty of bigamy under it's laws. It said "The State of South Carolina was the sovereign whose authority was disregarded when the bigamous marriage was celebrated. If the defendant married a second time in South Carolina, the act has no tendency at the time to affect society here, nor can that unlawful conduct be punished in this State." The case is a leading authority. It gives a thorough discussion of the general principle that a crime is an act that is local; that jurisdiction to prosecute it is in that State within whose territory the criminal act was committed. It is believed that the decision is sound. The act of bigamy was committed in South Carolina, and being committed there, was a crime against *its* laws only, and consequently North Carolina acquired no jurisdiction to prosecute the offender.

Sec. 38. The preceding discussion, however, raises this question, where *is* the crime committed? Certainly since a crime is local and must be prosecuted in the State where it was committed, there is difficulty in *some* cases, in determining its locality. A crime in some cases is a complex transaction. It can extend into several states. That is, it can be committed partly in one State and partly in another. And how are we to decide the locality of the crime? The general principle in this connection is, that crime is committed in that State where the last essential act is done, because it is not committed until it is completed. So that, if it is committed partly in one State and partly in another, the locality of the offense is not where it is begun, but where it is completed, since *completion is commission.* So therefore, if a crime consists of a succession of acts, or a continuous act, it is committed in that State where the final, essential, criminal act was performed.

This general principle was applied in *People v. Adams,* 3 Denio 190 (N. Y.) 45 Am. D. 468. In that case, the defendant was indicted in New York for the crime of obtaining property by false pretenses. The facts showed

that the defendant had sent an innocent agent into New York with instructions to make certain representations to third parties there, and obtain property from them on the faith of them. These statements were really false and fraudulent, but the agent was ignorant of it, and after receiving the money, delivered it to the defendant, who meanwhile had come into New York. The Court held that he was guilty. The crime was obtaining property by false pretenses. It was *begun* in Ohio by the concoction of the plan, but it was *completed* in New York where the property was obtained. And being complete in New York, it was committed there. Hence, New York had jurisdiction of the offense.

Now, in view of the preceding explanations, there should be no difficulty with the subject. Of course, the general principle is clear, that a crime must be redressed where it was committed; and that it is committed where it was finally completed. But there are three crimes that are governed by special rules. That is, they are not exceptions to the general principle, but their very peculiar nature makes it necessary to discuss them separately.

Sec. 39. To begin with, one of these very peculiar crimes is conspiracy. Now, as we have just stated, it is not an exception to the general rule. Hence, conspiracy is committed in that State where it is completed. It is completed not where the criminal agreement had its *inception,* but in that State where it had its *consummation.* That is simple. Conspiracy is in the law of crimes, an *agreement* to commit come ulterior crime. It is not necessary however that the ulterior crime be committed. The very *agreement* between two persons to commit it completes and consummates and commits the conspiracy. Therefore, it is a crime, not where the criminal proposition originated, but where it was accepted; even though the intended ulterior crime was never committed.

A decision on the question is *Ex Parte Rogers,* 10

Tex. Cr. App. 655, 38 Am. R. 654. In that case, the defendant was convicted of conspiracy in Texas, and brought habeas corpus proceedings for his discharge from custody, on the ground that the Court had no jurisdiction. It appeared however, that the defendant and an accomplice agreed in Texas to forge the title to property in that state, and in fact actually committed the forgery there, although the whole plan originated with the confederate in Illinois. The Court dismissed the writ and held him guilty. Conspiracy consists in the agreement to commit some secondary offense; and regardless of the locality of the intended offense, and in reality, irrespective of whether it was actually committed; conspiracy being a separate preliminary crime, was complete not in Illinois, where the scheme had its origin, but in Texas where it was finally agreed to, and in fact was acted upon. So it can be said, that the general rule is that conspiracy is committed where the criminal agreement is entered into.

Sec. 40. Another very peculiar crime is homicide. It is peculiar in that it too, like conspiracy, consists of *two* acts, instead of one. That is, homicide is criminally killing a person by the infliction of violence. It therefore includes two essential acts—the fatal injury and the death. Of course, if the injury and the death occur in the one state, there is no CONFLICT OF LAWS. But suppose the injury is inflicted in one state and the death occurs in another state? This was the identical state of facts in *Green v. State,* 66 Ala. 40, 41 Am. R. 744. There, the defendant was convicted of murder by the Alabama Court. The case showed that the injury was inflicted in Alabama, but that the death occurred in Georgia. The Supreme Court of Alabama affirmed the judgment of conviction by the trial Court. With reference to the question as to whether the locality of the homicide was Alabama or Georgia, the Court said: "Our view is that the crime of murder consists in the infliction of a fatal wound, coupled with the requisite contemporaneous in-

tent or design, which legally renders it felonious. The subsequent death of the injured party is a *result or sequence,* rather than a constituent elemental part of the crime." Hence, in view of this decision, it is no doubt true that homicide requires injury and death as its elements; but the injury is the completed criminal act, while the death is its natural involuntary consequence. In the light of that peculiarity, the last essential act in homicide is the *injury,* and therefore, homicide is complete in the state not where the death ensues, but where the injury was wilfully and voluntarily inflicted by the defendant. So it is then, that homicide is in reality, no exception to the general rule that a crime is committed in that state where the last essential act was done.

Sec. 41. But of all crimes in the CONFLICT OF LAWS larceny is the most peculiar. The *gravamen* of this offense is the criminal removal of property. If there is an intention to steal, all that is necessary to make it larceny is the removal of the property. So therefore, if property is criminally removed *within* a state, it is always larceny. And if it is criminally removed *out* of a state, it is always larceny. And if it is criminally removed *into* a state, it is always larceny. In all those three different forms of removal, a crime has been committed. In fact, where the removal is not wholly within *one* state but begins in *one* state and ends in *another,* there are really two distinct larcenies. That is clear. Larceny is a crime against a state as a whole. Hence, if the removal is within the limits of only one state, there is only *one* state involved, and therefore only one larceny. But if the removal is between two states, that is, it is exported from one and imported into another, there are *two* states involved, and therefore two larcenies. That is, in such a case it is an act of larceny to carry it out of one state, and a separate original act of larceny to carry it into another.

At this juncture, it will be objected that an act of

importation or an act of exportation, from one state to another, is not a *state* crime; that it is a Federal Crime, involving as it does interstate commerce. That is true to a certain extent. There is interstate commerce in the case. But still, these acts are state offenses, because the states have by statutes made them state offenses; and because the states can constitutionally make acts of interstate commerce criminal, until the United States by express inconsistent legislation, has made them Federal Crimes, and thus nullified state laws. This has not been done in the law of larceny, excepting that the National Motor Vehicle Theft Act (Act of Oct. 29, 1919; Ch. 89, 41 Stat. L. 324) makes it a Federal Crime to import into or export from, one state to another, stolen automobiles. Hence, as to that single class of property, while it is a State Crime to criminally remove it *within* a state, it is no longer a state crime to import or export stolen motor vehicles from or into, any state in the Union. But the conflict of federal and state jurisdiction is strictly a constitutional question. We are, in the CONFLICT OF LAWS, dealing entirely with the relative powers of one state as against all other states.

Another instructive case in which this branch of the subject was discussed is *State v. Kief,* 12 Mon. 92, 29 Pac. 654. In that case, the defendant was indicted for larceny. The facts showed he stole certain property in Canada and brought it into Montana. The Court held he was guilty. The act of importing stolen property from another jurisdiction constituted the crime. Now a few words with reference to this decision. The defendant was convicted under a statute that provided: "Every person who shall felonously steal the property of another in any other state, territory or country, and shall *bring it into* Montana, can be convicted as if such larceny had been committed within this territory." It is clear from the statute that the act of importation was the larceny, and certainly a state can constitutionally enact that importing stolen property into its limits is a crime. The importation of it is certainly an act done in the

state; and hence being a local act, is subject to the laws of that state, and can consequently be made criminal. The policy behind this statute is very commendable. Its purpose is to discourage traffic in stolen property; to exclude it from the state; and by doing so, confine it to the state whence it was taken, so that its lawful owners can readily and promptly recover it. No criminal statute could possibly be predicated on sounder principles than is the class of statutes under discussion.

So therefore in conclusion, larceny is in reality a continuous offense. In fact, it is a succession of separate offenses, being complete and committed in every separate state from, through or into which the stolen property was taken; because in each it is a consummated offense by the single *act of removal,* and so, it not only strengthens but confirms our general proposition, that a crime is a crime wherever the *essential* act is done.

PENAL ACTIONS

CHAPTER XII

Rule: A PENALTY IS A PUNITIVE LIABILITY IMPOSED ON A PERSON BY LAW FOR DOING, OR FAILING TO DO, A SPECIFIED ACT.[1]

Rule: A PENAL ACTION MUST BE BROUGHT IN THE STATE WHOSE LAW IMPOSES IT.[2]

Sec. 42. In this, our concluding chapter, we shall discuss the CONFLICT OF LAWS in reference to Penal Actions. This branch of our subject is treated last, because of its difficulty and because of the very peculiar character of penal actions, which strictly speaking, are partly tort and partly criminal proceedings, and yet are not distinctly one or the other. They are *sui generis*. They are therefore in the CONFLICT OF LAWS subject to special rules.

The real difficulty in penal actions however, it is believed, is in recognizing them, and not in applying the governing law after they are recognized. Because, once an action is held to be penal, it is local; it must be redressed in the state whose laws impose it; and it cannot be sued on in other states. In so far as a penal action is local and must be redressed in the state whose laws create it, it is criminal, but in so far as the liability it creates is pecuniary, it is a civil proceeding.

1—O'Reilly vs. R. R. Co., 16 R. I. 388, 17 Atl. 906; Huntington vs. Attril, 146 U. S. 657, 13 S. Ct. R. 224; **RAISOR VS. R. R. CO., 215 ILL. 47, 74 N. E. 69;** Gulledge Bros. Lumb. Co. vs. Land Co., 122 Minn. 266, 142 N. W. 305.

2—Carnahan vs. W. U. Tel. Co., 89 Ind. 526, 46 Am. R. 175; O'Reilly vs. R. R. Co., 16 R. I. 388, 17 Atl. 906; Raisor vs. R. R. Co., 215 Ill. 47, 74 N. E. 69; *See:* Stack vs. Lum. & Ced. Co., 151 Mich. 21, 114 N. W. 876; **GULLEDGE BROS. LUMBER CO. VS. LAND CO., 122 MINN. 266, 142 N. W. 305.**

Now to begin with, when *is* an action penal? This is the necessary preliminary question. It has certain qualities. A penal action is always a statutory liability to pay money. And that liability is imposed for either doing, or failing to do, an act specified in the statute. And lastly, that liability is *arbitrary*. This last quality is the essential quality that brands an action as penal. In the first two qualities, as a matter of fact, a penalty resembles a tort. And why? As in torts, the liability is statutory. As in torts, that liability is imposed for doing or failing to do a certain act. But, here is the distinction: the liability in a penalty is a *certain definite arbitrary sum fixed by the statute.* On the other hand, in a tort, the sum recoverable is not fixed at all by the statute, but must be determined from the evidence by a court or jury. Hence, since in a penalty the statute both establishes a liability *and* fixes the measure of it, it is akin to a criminal fine, and hence is called a penal action, since it has the punitive element in it. There are other tests that are occasionally proposed to determine whether an action is penal, but it is believed that the test of arbitrariness of the sum recoverable is infallible.

Now of course there are various forms of penal action. That is, some impose an amount and provide that no *more* is recoverable. While others impose an amount and provide that no *less* is recoverable. But in either case such statutes are purely penal. They savor of criminal laws which aim to penalize the guilty, rather than merely compensate the injured party. And yet, in spite of the criminal aspect of a penal action, it has, as has been said, a civil aspect. That is, it *incidentally* assists the injured party in recovering the specified sum. So therefore, our conclusion is that a penal action is an arbitrary liability imposed by statute for doing or failing to do a specified act. If the liability imposed by a statute for doing or failing to do a specified act is not directly fixed by the statute, but must be determined by a court or jury from the evidence on the trial, the statute is not penal. In such case it is an ordinary tort.

Now, for example, take a death action. The liability to pay for a death caused is imposed by statute. And that liability is imposed for doing that specified act. *But* does the statute go further? Does it fix and measure and prescribe an arbitrary sum recoverable? No it does not. The court or the jury fixes the sum recoverable after considering the facts, and since therefore a death action is essentially compensatory, it is a tort proceeding.

And yet, that very death action could be readily made penal. For example, in *Raisor v. R. R. Co.,* 215 Ill. 475, 74 N. E. 69, a Missouri statute imposed a liability on any railroad for causing the death of a party, *and* fixed the *arbitrary* sum of $5,000 to be recoverable in *all* cases where a death was produced An action was brought in Illinois to recover under the Missouri Statute the $5,000 liability for a death caused there. But the Illinois Court held the action could not be brought. It held that the action was penal; that it imposed a liability; that the liability was imposed for doing a specified act; but since the amount was *arbitrarily* fixed by the statute, it was penal, and could be redressed only in Missouri.

Sec. 43. In the light of the preceding explanation, it is not necessary to again state that the test of a penalty is that the sum recoverable is always fixed directly and definitely by the statute that imposes a liability. Its purpose, in other words, is penal. That is, it requires the defendant to pay a certain arbitrary sum at all events, *regardless* of the actual loss sustained by the other party. Hence, such a statute partakes of a criminal law that is punitive, and not of a civil law that is compensatory, since its punitive purpose predominates, and its compensatory element is wholly incidental. So it is therefore, that since a penal liability is essentially criminal, and only in a secondary way civil, it is in the CONFLICT OF LAWS, substantially deemed to be a criminal proceeding. Consequently a penal action being fundamentally criminal, is *local,* must be redressed locally; and therefore cannot be enforced in any other state

under the principles of Comity. That is, being criminal, a penal action must be brought in the state where it accrued; and on jurisdictional grounds, is unenforcible in other states, because one state does not, and cannot enforce, the criminal or penal laws of another. Such laws and actions based on them pertain only to the local sovereignty of the state whence they had their inception. So therefore, the general rule is that a penal action being inherently a criminal action, must be redressed in that state whose laws create it. That is, no other state has jurisdiction to enforce it, because jurisdiction in criminal and penal actions is strictly local and territorial, and hence exists only in the state whose laws were violated.

By strange coincidence, that principle—the locality of laws—brings to memory the first introduction to our subject; and completes here the discussion of the CONFLICT OF LAWS. We have discussed the subject; learned its principles; and analyzed its decisions. And after all, the CONFLICT OF LAWS is based simply on certain fundamentals, that by careful selection, manifests a symmetry and a consistency and a unity that has no parallel in any other subject of the Law.

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